United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1908.

No. 1912. 567

No. 6, SPECIAL CALENDAR.

GEORGE B. CORTELYOU, SECRETARY OF THE TREASURY, APPELLANT,

vs.

UNITED STATES OF AMERICA ON THE RELATION OF FRANCIS N. THORPE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JUNE 13, 1908.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 22, 1908.

In the Court of Appeals of the District of Columbia.

No. 1912.

GEORGE B. CORTELYOU, Secretary of the Treasury, Appellant,
vs.
UNITED STATES OF AMERICA on the Relation of FRANCIS N. THORPE.

a Supreme Court of the District of Columbia.

At Law. No. 50034.

UNITED STATES OF AMERICA on the Relation of FRANCIS N. THORPE, Petitioner,
vs.
GEORGE B. CORTELYOU, Secretary of the Treasury, Respondent.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:—

1 *Petition.*

Filed December 12, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 50034.

UNITED STATES OF AMERICA on the Relation of FRANCIS N. THORPE, Petitioner,
vs.
GEORGE B. CORTELYOU, Secretary of the Treasury, Respondent.

To the Honorable the Judges of the Supreme Court of the District of Columbia:

The Petition of Francis N. Thorpe, of Mt. Holly, N. J., Respectfully Represents:

I. That for many years past he has devoted himself to special studies and work in State and Constitutional law, Colonial charters, Constitutions, and organic laws of the United States, and after eleven years of labor, devoted to the collaboration of material, he presented a petition to the Senate and House of Representatives in Congress assembled, praying for the publication of a New Edition of the Charters and Constitutions and Organic Laws of the United States, setting forth the material omissions of the work known as the Ben. Perley Poore Compilation, and presented a manuscript prepared by

himself supplying such omissions, together with a bibliog-
2 raphy, and accompanied by letters from senators, historians, students and teachers of history, college professors, and others, showing estimates of the value of such a publication.

II. The petition was referred on the twenty-second of January, 1897, to the Committee on Printing, and ordered to be printed. After successive efforts during the ensuing years, the matter was so proceeded with that by an Act of Congress entitled "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Year Ending June 30th, 1907," it was enacted by the Senate and House of Representatives of the United States of America that the following sums be and the same are hereby appropriated *inter alia* as follows:

"Charters and Constitutions: For the purchase from Professor Francis N. Thorpe of the manuscript for a new edition of charters, constitutions, and organic laws of all the States, Territories, and colonies now or heretofore forming the United States, and any Acts of Congress relating thereto, prepared by him, ten thousand dollars: *Provided*, That he shall prepare a complete index of the work and do all proof reading in connection with the preparation, printing, and publication thereof, and the Public Printer shall print and bind six thousand copies of the work, of which two thousand copies shall be for the use of the Senate and four thousand copies for the use of the House of Representatives."

The foregoing Act was duly approved June 30th, 1906.

3 *III.* Your Petitioner, desiring to be informed as to the method of payment, addressed to the Secretary of the Treasury a communication through the Honorable Arthur L. Bates, a Member of Congress, and received a reply through Mr. Bates, as follows:

"TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, *August* 6, 1906.

"Hon. Arthur L. Bates, Meadville, Pa.

"SIR: Referring to your letter of the 30th ultimo relative to an appropriation of $10,000 in the Sundry Civil act approved June 30, 1906, for the purchase from Professor Francis N. Thorpe of the manuscript for a new edition of Charters, Constitutions, etc., of all the States, etc., and in reply to your inquiry as to the method of payment in the case, I have to state that the Public Printer should be communicated with in the matter, upon whose certificate of receipt of the manuscript and index, and statement that the work thereon has been performed, as required in the law, payment can be made.

"A copy of the Sundry Civil act containing the appropriation for this object (page 70 thereof) is enclosed herewith.

"Respectfully,

(S'g'd) J. B. REYNOLDS,
Assistant Secretary."

4 He also addressed a communication to the Public Printer, and received in reply the following communication:

"GOVERNMENT PRINTING OFFICE,
OFFICE OF THE PUBLIC PRINTER,
WASHINGTON, D. C., *August* 8, 1906.

"SIR: Referring to your favor of August 6th, regarding the clause providing for the printing of charters and constitutions, the manuscript for which is to be supplied by you, I have to inform you that this manuscript may be sent to the Government Printing Office by express at any time you may desire to do so.

"This appropriation is to be expended by the Treasury Department, upon a certificate from the Public Printer that the manuscript and index have been furnished, and that the whole matter has been proof read.

"Very truly yours,
(S'g'd) CHAS. A. STILLINGS,
Public Printer.

"Prof. Francis M. Thorpe, The Indian Arrow Vineyards, Northeast, Pa."

IV. On October 20th, 1906, your petitioner received the following letter from the Public Printer:

5 "OFFICE OF THE PUBLIC PRINTER,
WASHINGTON, *October* 20, 1906.

"SIR: Referring to the Act of the last session of Congress, providing for the printing of "Charters and Constitutions", and your letter of August 6th and my reply thereto of August 8th upon the subject, I desire to inform you that this Office is now in excellent shape to take up the printing of this document, provided you can forward the manuscript.

"Very truly yours,
(S'g'd) CHAS. A. STILLINGS,
Public Printer.

"Prof. Francis M. Thorpe, Northeast, Pa."

V. Thereupon your petitioner proceeded to put the manuscript in shape for printing, and requested the Public Printer to advise him as to the form required, and received in reply the following instructions:

"DECEMBER 1, 1906.

"SIR: Your communication of the 24th ultimo, relative to the manuscript of the new edition of Charters and Constitutions, is before me.

"In reply thereto, would say that, it will be entirely agreeable to send part of it as printed text, and part as typewritten manuscript, provided the printed text is on one side of the sheet only;
6 otherwise, it will be necessary for us to have two copies of the text in order to handle it.

"Trusting this is the information you seek, I remain,

"Very truly yours,
(S'g'd) CHAS. A. STILLINGS,
Public Printer.

"Francis H. Thorpe, Esq., Editor, Mt. Holly, N. J."

On the seventh of January, 1907, your petitioner received the following letter from the Public Printer:

"OFFICE OF THE PUBLIC PRINTER,
WASHINGTON, *January* 7, 1907.

"MY DEAR MR. THORPE: Your communication of January 3rd, making inquiry as to the probable length of time it would take to print the new edition of "Charters and Constitutions" after it should be received at this Office, is before me.

"In reply thereto would say, that if you send the completed manuscript to this Office about the first of February as suggested in your letter, we could not give any definite promise at this time as to the probable length of time it would take to furnish proof.

"However, after the adjournment of Congress, on March 4, 1907, we could take this matter up and get it out in the shortest possible time.

7 "Of course, the matter of certifying that the job has been satisfactorily turned over to this Office, would depend entirely upon how long it would take you to read the proof after it had been sent to you from here, as the law specifically states that proof must be read by you and all corrections noted thereon.

"The matter of the appropriation and the time for paying the same rests entirely with the Treasury Department, but I am of the opinion that the appropriation would not go by default if the job was not completed by the first of July, as I understand the appropriation is a continuous one until the matter shall be closed up.

"However, on this point I would suggest that it would be better for you to communicate with the Secretary of the Treasury.

"Very truly yours,
(S'g'd) CHAS. A. STILLINGS,
Public Printer.

"Mr. Francis N. Thorpe, Mount Holly, New Jersey."

VI. In accordance with the suggestion of the printer your petitioner communicated with the Secretary of the Treasury, and received the following reply:

8 "TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, *January* 18, 1907.

"Mr. Francis N. Thorpe, Mt. Holly, N. J.

"SIR: In reply to your communication of the 8th instant, in regard to the availability of the appropriation of $10,000. made by the Sundry Civil Act of June 30, 1906, for the purchase from you of certain manuscript of charters and coustitutions, I have to inform you that the Comptroller of the Treasury, in an opinion under date of the 14th instant, decides that the said appropriation is available until the work shall be completed.

"The letter of the Public Printer to you is returned herewith, as requested.

"Respectfully,
(S'g'd) J. B. REYNOLDS,
Assistant Secretary."

VII. Relying upon the foregoing communications, and in accordance with the instructions of the Public Printer, on the second of May, 1907, your petitioner addressed to the Public Printer the following communication:

"MT. HOLLY, N. JERSEY, *May* 2, 1907.

"Hon. Chas. A. Stillings, Public Printer, Washington, D. C.

"DEAR SIR: I hereby transmit and deliver to you the
9 manuscripts of "Charters, Constitutions and Organic Laws" the purchase of which from me was provided for by Act of Congress of 30 June, 1906. Said manuscripts are complete, being a true and correct copy of the Organic Acts they purport to embody. Each and every Act has been verified by me from authentic and official source or sources, said source or sources being cited and plainly shown in notes accompanying said manuscripts, copy herewith submitted and delivered. I hereby take occasion to declare that the aggregate manuscripts herewith transmitted contain all and every said Charters, Constitutions and Organic Laws, or appropriate citation thereof, said citation or citations being of supplementary and subordinate acts, a knowledge of which may be desired as explanatory, in some sense, of Charters, Constitutions and Organic Laws as referred to in said Act of Congress above cited.

"I believe that the manuscripts comprise the complete, authentic and up to date transcript of the original acts, severally and as a whole. The entire work has been in preparation since September, 1885, and has received my personal attention, revision and labor. The manuscripts comprise 5000 pages, more or less.

"Yours very truly,
(S'g'd) FRANCIS N. THORPE."

Your petitioner also delivered said manuscript to the Public Printer and received from him the following receipt:

10 "MAY 2, 1907.

"Received of Professor Francis N. Thorpe of Mount Holly, N. J., manuscript copy, said to contain "Charters, Constitutions and Organic Laws", except the index, subject to the conditions provided for in the Act of June 30, 1906 (Pamphlet Laws of the first session, Fifty-ninth Congress, page 759).

(S'g'd) CHAS. A. STILLINGS,
Public Printer."

VIII. Your petitioner avers that he has faithfully complied with the requirements of the Act of Congress, that he has duly received, corrected and returned to the Public Printer the galley proofs and page proofs of the work, that he has prepared a complete index of the work, and has read and returned the proof in connection with the preparation, printing and publication thereof, that the work is now in type in five volumes, with title pages as follows:

CONSTITUTIONS,

COLONIAL CHARTERS, AND OTHER

ORGANIC LAWS

OF THE

STATES, TERRITORIES, AND

COLONIES

Now or Heretofore Forming

THE UNITED STATES OF AMERICA.

Compiled and Edited

under the Act of Congress of June 30, 1906,

BY

FRANCIS NEWTON THORPE, PH. D., LL. D.,

Member of the Pennsylvania Bar; Fellow and Professor of American Constitutional History at the University of Pennsylvania, 1885-1898; Member of the American Historical Association; Author of The Constitutional History of the United States, 1765-1895; A (State) Constitutional History of the American People, 1776-1850; A Short Constitutional History of the United States; A (Social and Economic) History of the American People; A History of the Civil War; Editor of the History of North America, Volumes IX, XV, XVI, XVIII, XIX, XX; Author of The Government of the People of the United States; Benjamin Franklin and the University of Pennsylvania; The Life of William Pepper, etc.

Vol. I.

UNITED STATES—ALABAMA—GEORGIA.

Washington:
Government Printing Office.
1907.

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THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES

Now or Heretofore Forming

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Vol. II.

GUAM—MARYLAND.

Washington:
Government Printing Office.
1907.

CONSTITUTIONS,

COLONIAL CHARTERS, AND OTHER

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Vol. III.

MASSACHUSETTS—NEW HAMPSHIRE.

Washington:
Government Printing Office.
1907.

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THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES

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Vol. IV.

NEW JERSEY—SOUTH DAKOTA.

Washington:
Government Printing Office.
1907.

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THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES

Now or Heretofore Forming

THE UNITED STATES OF AMERICA.

Compiled and Edited

under the Act of Congress of June 30, 1906,

BY

FRANCIS NEWTON THORPE, PH. D., LL. D.,

Member of the Pennsylvania Bar; Fellow and Professor of American Constitutional History at the University of Pennsylvania, 1885-1898; Member of the American Historical Association; Author of The Constitutional History of the United States, 1765-1895; A (State) Constitutional History of the American People, 1776-1850; A Short Constitutional History of the United States; A (Social and Economic) History of the American People; A History of the Civil War; Editor of the History of North America, Volumes IX, XV, XVI, XVIII, XIX, XX; Author of The Government of the People of the United States; Benjamin Franklin and the University of Pennsylvania; The Life of William Pepper, etc.

Vol. V.

TENNESSEE—WYOMING—INDEX.

Washington:
Government Printing Office.
1907.

16 *IX.* Your petitioner further avers that he has received the following certificate from the Public Printer:

"OFFICE OF THE PUBLIC PRINTER,
WASHINGTON, *September* 9, 1907.

"DEAR SIR: I have this day forwarded to the Secretary of the Treasury, a certificate that you had furnished the manuscript for a new edition of Charters, Constitutions, and Organic Laws of all the States, Territories and Colonies now or heretofore forming the United States, and any acts of Congress relating thereto, prepared by you, that you had prepared a complete index of the work and that you had read proof in connection with the preparation, printing, and publication thereof.

"Very truly yours,
(S'g'd) CHAS. A. STILLINGS,
Public Printer.

"Prof. Francis N. Thorpe, Indian Arrow Vineyards, North East, Pa."

X. Your petitioner further avers that he has done all that he is required to do under said Act of Congress, and in accordance with the instructions and requirements of the Public Printer, that he has delivered his work, which has been accepted and printed by the Public Printer, and was thereupon and is now entitled to receive his money in the amount of Ten thousand dollars ($10,000.) as
17 appropriated by said Act of Congress.

XI. Your petitioner further avers that he wrote to the Secretary of the Treasury requesting payment, and received the following reply:

"TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, *October* 14, 1907.

"Professor Francis N. Thorpe, Mt. Holly, N. J.

"SIR: Your recent communications relative to payment for manuscript of "Charters, Constitutions and Organic Laws" the purchase of which was provided for by Act of June 30, 1906, (34 Stat. Part 1. p. 759) have been received and in reply I have to state that the matter of payment will be considered and determined without unnecessary delay and you will be fully advised of any action taken by the Department.

"Respectfully,
(S'g'd) J. H. EDWARDS,
Acting Secretary."

That he again wrote to the Secretary of the Treasury and received the following reply:

"TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, *October* 30, 1907.

"Professor Francis N. Thorpe, Mt. Holly, N. J.

"SIR: In reply to your communication of the 28th instant
18 requesting payment of the sum of $10,000 appropriated by the Act of June 30, 1906 (34 Stat., part 1, p. 759), for the

purchase from you "of the manuscript of a new edition of charters, constitutions and organic laws of all the States, Territories, and Colonies, now or heretofore forming the United States, and any Acts of Congress relating thereto," I have to state that the act is silent as to official certification to this Department as a basis for the payment of the sum appropriated.

"The Act providing for the purchase of the manuscript directed the printing of the new edition of "Charters, Constitutions and Organic Laws", for the use of the Senate and House of Representatives, Questions regarding the manuscript have been presented to this Department which appear to be solely for the Congress or its committee to decide. In view of these conditions this Department before making payment for the manuscript will await the further direction of Congress.

"Respectfully,
(S'g'd) J. H. EDWARDS,
Acting Secretary."

That he again wrote the Secretary of the Treasury and received the following reply:

"TREASURY DEPARTMENT,
WASHINGTON, *November* 8, 1907.

"MY DEAR SIR: Your two letters of November 1 have been received and both brought to the personal attention of the
19 Secretary. It has been decided to await the approval of such person or persons as Congress may designate to pass upon the question as to whether or not you have completed the work as provided. If you have complied fully with the intent of the act, you will suffer no great delay in awaiting the approval of the Congress in the premises.

"Very truly yours,
(S'g'd) J. H. EDWARDS,
Acting Secretary.

"Mr. Francis N. Thorpe, Mt. Holly, N. J."

XII. That on the 26th of November, 1907, he called personally upon the Secretary of the Treasury, and was informed by the Acting Secretary that objections had been lodged with him from two persons who did not think that the manuscript was complete. The Acting Secretary declined to state the objections which had been made and declined to furnish copies of said objections, and further declined to permit copies of such objections to be made. Thereupon your petitioner requested payment of the sum of money due under the Act of Congress for said work, which request for payment was positively refused, accompanied by the statement that it was the intention of the Secretary to refer the matter back to Congress for action.

XIII. Your petitioner is advised and therefore avers that the Secretary of the Treasury is without discretion in the matter, that the Act of Congress of June 30th, 1906, appropriated a sum of
20 money for a specific thing, which your petitioner has delivered, that said work is not subject to the approval of out-

siders, nor of the Secretary, nor even of Congress, nor of a Committee of Congress, sitting as historical or literary experts, that the transaction was one of purchase and sale, and that the vendor, having done all that he was required to do and having delivered the subject matter of the sale, is now entitled to his money without further delay.

Wherefore your petitioner prays that your Honorable Court shall direct a writ of mandamus to issue directed to George B. Cortelyou, Secretary of the Treasury, directing him to make payment to your petitioner of the sum of Ten thousand dollars ($10,000.) and draw his warrant in the usual way.

And he will ever pray, etc.

FRANCIS N. THORPE.

HAMPTON L. CARSON,
GEORGE E. HAMILTON,
Counsel.

Francis N. Thorpe, being first duly sworn, on oath deposes and says that he has read the foregoing pe-ititon by him subscribed, and knows the contents thereof; that the matters and things therein stated on his personal knowledge are true, and those stated on information and belief he believes to be true.

FRANCIS N. THORPE.

Subscribed and sworn to before me this Sixth day of December, A. D. 1907.

[SEAL.] JOHN S. WURTS,
Commissioner of Deeds for the District of Columbia in Pennsylvania, Resident at the City of Philadelphia.

21 *Rule to Show Cause.*

Filed December 12, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 50034.

UNITED STATES OF AMERICA on Relation of FRANCIS N. THORPE, Petitioner,
vs.
GEORGE B. CORTELYOU, Secretary of the Treasury, Respondent.

Upon consideration of the petition filed in the above-entitled cause, it is by the Court this 12th day of December, A. D. 1907, ordered that the respondent, George B. Cortelyou, Secretary of the Treasury, show cause in this Court on the 20th day of Dec., 1907, at ten o'clock, A. M., why the writ of mandamus should not issue as in said petition prayed. Provided that a copy of this order be served on said respondent on or before the 14th day of December, A. D. 1907.

WRIGHT, *Justice.*

Marshal's Return.

Served copy of the within rule to show cause, together with copy of the petition in this cause, on George B. Cortelyou, Secretary of the Treasury, personally Dec. 12, 1907.

AULICK PALMER, *Marshal.*
S.

22 *Return of Respondent to Rule to Show Cause.*

Filed December 28, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 50034.

UNITED STATES OF AMERICA on Relation of FRANCIS N. THORPE, Petitioner,

vs.

GEORGE B. CORTELYOU, Secretary of the Treasury, Respondent.

To the Honorable the Judges of the Supreme Court of the District of Columbia:

The return of James B. Reynolds, Acting Secretary of the Treasury, respondent, to the petition filed herewith praying for a writ of mandamus and to rule to show cause issued thereon, respectfully represents as follows:

1. This respondent has no knowledge of the averments of the first paragraph of the petition with respect to the petitioner having devoted himself to special studies and work in State and Constitutional law, Colonial Charters and the like to the extent set out in the said paragraph, nor does he know definitely the details of petitioner having presented a petition to the Senate and House of Representatives praying for the publication of a new edition of the Charters and Constitutions and Organic Laws of the United States,

23 setting forth the omissions of the Ben. Perley Poore Compilation, and presenting a manuscript prepared by petitioner supplying these omissions, etc. Respondent says, on information and belief, that petitioner some ten years ago did present such a petition to the Senate and House of Representatives in Congress assembled, and attempted at that time and thereafter to have the petition adopted by Congress and have Congress purchase his manuscript for a new work or edition of the Charters, Constitutions and organic laws of the United States, but that Congress declined to make such a purchase and petitioner's effort thereupon failed.

2. Answering the second paragraph of the petition, this respondent says that he is not informed as to whether the petition referred to in this paragraph was referred to the Committee on Printing on the 22d day of January, 1897, and that if the same be material he call- for strict proof thereof. With respect to the further averments

of this paragraph, that after several efforts during the ensuing years the matter was so proceeded with that by an Act of Congress, entitled, "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Year Ending June 30, 1907," a provision was made for the purchase of the manuscript of petitioner for a new edition of the charters, constitutions and organic laws of all the states, territories, etc., of the United States, this respondent says that the averments are not accurate in the detail of the circumstances of the enactment of this provision in the Sundry Civil Act approved June 30, 1906, and that the averments as stated in the said second paragraph in manner and form in this tenor are untrue.

This respondent says that petitioner did not present any
24 petition as is referred to by him in the first paragraph of his petition, or any memorial urging the expediency of the purchase of his manuscript of the character set out in the first paragraph, in the Fifth-ninth Congress, or about or prior to the time of the passage of the Sundry Civil Act approved June 30, 1906; nor further, this respondent states, on information and belief, is it true that any previous petition or memorial submitted by petitioner some few years ago, was re-presented to the House of Congress at this time. On the contrary, this respondent represents, upon information and belief, the question of the advisability and desirability of the purchase of some new edition of charters, constitutions and organic l*aws* of all the states, territories, and colonies then or heretofore forming the Union, and the Acts of Congress pertinent thereto, originated in the lower House of Congress. It was desired to obtain an edition on this important subject which would be sufficiently chronological, and which would contain complete information about the charters, constitutions and organic laws of the family of states and territories and colonies at the present time, as the then extant work of Ben. Perley Poore was thirty years old, or thereabouts, and thus wholly inadequate and incomplete with respect to the charters, constitutions and organic laws of all the states in so far as changes have occurred in those in existence at the time of the Perley Poore Compilation, and wholly inadequate with reference to states newly admitted to the Union, territories organized since the Perley Poore edition, and the colonies acquired thereafter, and, in general, altogether thirty years in arrear of the information necessary at
25 the present time concerning the charters, constitutions, and organic laws of the states, territories and colonies now forming or belonging to the United States. Originating in the House, negotiations were begun to purchase a manuscript for a new edition of the charters, constitutions, and organic laws, which would supply this desideratum, and petitioner herein advocated the purchase of the work which he represented would be definitely and distinctively a new edition along these lines, and which he had been preparing for some time, and which, before its final submission to the Government in the event of its purchase by the Government, would receive the benefit of the collaboration with the petitioner of Dr. Benjamin F. Shambaugh, Professor of History in the University of Iowa, and a historical scholar who had given much attention to specialization on these subjects. Accordingly, the work, treatise, or manuscript

represented by the petitioner herein to Congress as the work to be delivered to the Government in the event of its purchase thereof was not any manuscript for a new edition of the charters, constitutions and organic laws, nor any edition thereof which the petitioner might have, but was a definite, distinct, particular manuscript then represented and described to Congress by petitioner at the time of this negotiation, prior to the passage of the Act approved June 30, 1906; it was an individualized literary entity, offered on the one side by petitioner as for sale, and being considered by Congress on the other side as for purchase. In it was to be found a new, and therefore complete, edition of all the charters, constitutions and organic laws

of the states, territories and colonies now or heretofore form-
26 ing the United States and any acts of Congress relating thereto. Furthermore, as above set forth, this particular work represented by petitioner to Congress as the work offered for sale was to contain certain editing and revision by Professor Shambaugh. Such was the particular manuscript which was offered by petitioner for sale to Congress, and constituted a specific and distinctly featured literary entity, and being both a new edition of this old subject and one as to some parts of which Prof. Shambaugh had collaborated with petitioner, and the whole prepared by him. This being offered for sale to Congress, the Congress relied upon the purchase and the acquisition of this specific thing represented by petitioner, and agreed to purchase the same and appropriated $10,000 therefor in the Sundry Civil Act approved June 30, 1906, in the following language:

"Charters and Constitutions.

"For the purchase from Professor Francis N. Thorpe of the manuscript for a new edition of charters, constitutions, and organic laws of all the states, territories, and colonies now or heretofore forming the United States, and any acts of Congress relating thereto, prepared by him, ten thousand dollars:

Provided, That he shall prepare a complete index of the work and do all proof reading in connection with the preparation, printing, and publication thereof; and the Public Printer shall print and bind six thousand copies of the work, of which two thousand copies shall be for the use of the Senate and four thousand copies for the use of the House of Representatives."

It was further agreed by petitioner, and Congress accordingly made a provision therefor in the Act, that petitioner should prepare a complete edition of the work, and do all the proof reading in connection with printing and publication thereof.

27 3. This respondent admits that the allegations of the third paragraph are true in point of fact, but in so far as the same may be claimed to be pertinent by petitioner, this respondent demands strict proof thereof.

4 and 5. This respondent, upon information and belief, says that the allegations of the fourth and fifth paragraphs are true in point of fact, but in so far as they may be claimed by petitioner to be

pertinent or material to the questions raised herein, he demands strict proof thereof.

6. This respondent, upon information and belief, admits that the allegations in the sixth paragraph are true in point of fact, but in so far as they may be claimed by petitioner to be material or pertinent herein, he demands strict proof thereof.

7. As to the allegations of the seventh paragraph, this respondent, upon information and belief, admits that the petitioner did write such a letter as is set out therein to the Public Printer and as of date of May 2, 1907, but he does not admit the contents of said letter but denies the same in so far as the contents serve to state that the petitioner has complied with the requirements of the Act of Congress approved June 30, 1906, providing for the purchase of the particular manuscript represented by petitioner to the Congress as hereinbefore set out. This respondent denies, on information and belief, that the petitioner has complied with the Act of Congress, and with the true intent and meaning thereof, and denies that he has delivered to the Public Printer as claimed in the letter referred to in this paragraph the manuscript described in said letter;
28 but with respect to the allegations of this paragraph concerning the receipt of the Public Printer, dated May 2, 1907, this respondent admits, on information and belief, that such receipt was written by the Public Printer and delivered to the petitioner. This respondent states, however, that such a receipt is merely for the physical thing delivered to the Public Printer and is in no manner a certificate of the compliance by the petitioner with the Act of Congress in delivering to the Public Printer the particular and identical manuscript represented by petitioner to Congress.

8. Answering the allegations of the eighth paragraph, this respondent says, on information and belief, that he denies that petitioner has thoroughly complied with the requirements of the Act of Congress, as will be hereafter more particularly stated: That he is informed that petitioner has received and corrected and returned to the Public Printer the galley proofs and page proofs of certain manuscript and papers which he had previously delivered to the Public Printer, but he denies that petitioner has either delivered to the Public Printer the identical manuscript which was represented by petitioner to Congress as the manuscript Congress was to buy, or that he has corrected and returned the galley proofs or page proofs of this identical manuscript or prepared an index of the same, or that petitioner has done all the proof reading in connection with the printing and publication of this identical manuscript which Congress agreed to buy. This respondent, on information and belief, further denies that this manuscript which Congress agreed to buy is now in type, in five volumes, with the title
29 pages, as set out in the eighth paragraph of the petition herewith, and denies that such identical work was ever delivered by petitioner to the Public Printer, or to any officer of the Government.

9. This respondent, upon information and belief, admits that the Public Printer sent such a certificate as is set out in the ninth paragraph of the petition to the Secretary of the Treasury, but he denies

the allegations of the said paragraph in so far as they may be claimed by petitioner to prove that this is a compliance by him *in toto* with the Act of Congress approved June 30, 1906. The respondent further says that the duty of the Public Printer under this act is simple and specific; it is a single duty of printing and binding these six thousand copies of the work which the Congress agreed to buy and which petitioner agreed to deliver. Nor does it fall within the duty of the Public Printer to pass upon the work aforesaid, nor does his certificate prove more than that he received a certain manuscript from the petitioner purporting to be a delivery of charters, constitutions and organic laws of all the states, territories and colonies, nor does it prove that petitioner prepared a complete index to the work and did all the proof reading in connection with the printing and publication thereof. This respondent denies that the work submitted to the Public Printer, and to which the certificate referred to relates, was the identical work presented to Congress by petitioner and agreed upon to be purchased and delivered.

Further answering said ninth paragraph, this respondent
30 states that the Public Printer at the time of sending the certificate above referred to, wrote the Secretary of the Treasury, stating that objection had been raised to his receiving the work aforesaid on the ground that the manuscript submitted was not the identical manuscript which Congress agreed to buy, but that the said Public Printer felt he had no jurisdiction in the premises beyond his duty of receiving what was submitted.

The letter of the said Public Printer is as follows:

"In forwarding to you under this date, a statement relative to the new edition of "Charters, Constitutions, and Organic Laws," by Professor Francis N. Thorpe, I desire to call your attention to the fact that the quality of the manuscript (that is, its accuracy and completeness) has been brought into question.

Under the provisions of the Act of June 30 1906, (Stat. L, Vol. 34, Part 1, page 759) reading as follows:

"Charters and Constitutions: For the purchase from Professor Francis N. Thorpe of the manuscript for a new edition of charters, constitutions, and organic laws of all the States, Territories and colonies now or heretofore forming the United States, and any Acts of Congress relating thereto, prepared by him, ten thousand dollars:

Provided: That he shall prepare a complete index of the work and do all proof reading in connection with the preparation, printing, and publication thereof; and the Public Printer shall print and bind six thousand copies of the work, of which two thousand copies shall be for the use of the Senate and four thousand copies for the use of the House of Representatives."

I did not find that any discretion had been lodged in the
31 Public Printer, or authority to assert his own opinion of the completeness or accuracy of the manuscript, if he had one.

I therefore proceeded with the typesetting in order that the proofs might be furnished to the author and that he might not be deprived of the opportunity to complete his undertaking.

In bringing this to your attention I do so, not with a view to influencing your action, but merely to afford you, as the official charged with the disbursement of this appropriation, the opportunity to examine, if you desire, the objections which have been raised and to determine for yourself their weight and importance.

CHARLES A. STILLINGS,
Public Printer."

10. This respondent, upon information and belief, denies the allegations of the tenth paragraph, that petitioner has done all that he is required to do under the Act of Congress, and denies that he has delivered the work represented to the Congress, and denies that this work has been accepted or printed by the Public Printer; and further denies that petitioner is now entitled to receive the sum of $10,000 which is appropriated by the Act approved June 30, 1906.

11. Your respondent admits that the letters set out in the eleventh paragraph of the petition were written as therein set forth; and this respondent says with respect to the said letters that after said
32 petitioner had delivered to the Public Printer the manuscript received by him, it was discovered by Honorable Albert F. Dawson, Member of the House of Representatives from the State of Iowa, with whom as the representative of Congress the negotiations for the purchase of petitioner's work were had, and who was thoroughly familiar with all the details leading to the passage of the act appropriating ten thousand dollars, and who was instrumental in securing the passage thereof, and who, in that behalf, represented the Congress in its determination to purchase a certain specific work from the petitioner, and to whom a definite outline of the particular manuscript was exhibited at the time of the making of the contract of purchase, which later he, the said Dawson, succeeded in having embodied in the aforesaid act on the part of Congress, that the manuscript submitted to the Public Printer and received by him was not the identical manuscript, nor the identical, specific, individual thing which Congress agreed to buy and for whose purchase it appropriated ten thousand dollars. The manuscript delivered to the Public Printer was not the new edition represented to the Congress, and the collaboration of Prof. Shambaugh was wholly omitted in the manuscript delivered. The Act of Congress above referred to being silent as to a provision for official certification that the work as delivered is the identical work agreed to be purchased, this respondent was notified by Representative Dawson on behalf of the Congress that the work as submitted by the petitioner to the Public Printer was not the identical work submitted to Congress and agreed to be bought by it, and that the same was not accepted. Upon thus being notified
33 that petitioner had not complied with the Act of Congress, your respondent declined to make payment as set out in the said letters.

12. This respondent admits that the petitioner called as set out in the twelfth paragraph of the petition, but states that petitioner was informed that the act had not been complied with by petitioner and that it was the intent of your respondent to advise Congress

when it convened of the status of the case, and receive such instruction in the premises as it might see fit to give.

13. In answer to the thirteenth paragraph of the petition, your respondent says that the averments of the petition in this paragraph, that the Secretary of the Treasury is without discretion in the matter, is not pertinent, but that the Act of Congress having appropriated a sum of money for a specific thing, it is untrue that petitioner has delivered such specific thing, and, accordingly, your respondent cannot pay the money appropriated by the Act until petitioner has complied fully with the same.

Your respondent in further answer to the said thirteenth paragraph says, that if the transaction was one of purchase and sale, the vendor, who is the petitioner herein, has not delivered to the vendee the identical thing agreed upon for the purchase, and that, accordingly, he is not entitled to the money agreed upon as the consideration.

Answering said paragraph, and the petition as a whole, your respondent says that he is charged with the disbursements of the moneys of the United States, and the Act of Congress approved June 30, 1906, appropriated ten thousand dollars for the
34 purchase of a specific thing. The said specific thing was a certain, distinct and individualized manuscript represented to the Congress of the United States to contain a new edition of the Charters, Constitutions and Organic laws of all the States, Territories and colonies now or heretofore forming the United States, and any acts of Congress relating thereto, prepared by petitioner, and under the circumstances hereinbefore set out in answer to the earlier paragraphs of the petition. The Act appropriating the money is silent as to any provision for the examination on the part of the Government of the manuscript delivered to the end of ascertaining its identity with the manuscript offered for sale and agreed to be purchased. No such duty is imposed upon the Public Printer, and he has attempted to do only the one thing of printing and binding and the manufacturer's work in connection therewith. Upon your respondent, as the official of the Government charged with the disbursements of the public moneys, then fell the duty of seeing that such moneys were properly paid out, and that this sum of ten thousand dollars appropriated by the Act of June 30, 1906, was paid as the consideration for the receipt of the manuscript referred to in the said Act. Prior to the time of the said sum becoming due and payable, if at all, this respondent was notified by the Member of Congress who was responsible for the resolution of Congress to purchase the manuscript referred to in the act and who was familiar with the details and negotiations leading to the contract of purchase resulting in the act as above set forth, that the work and manuscript delivered to the Public Printer by petitioner was not the
35 manuscript agreed to be bought, and your respondent thereupon declined to pay the sum of ten thousand dollars until the said act had been complied with, and so notified the petitioner.

Respondent further says that as soon as said petitioner will comply with the terms and with the intent of the said act, and deliver to the

Public Printer, the identical specific manuscript which he represented to Congress that he would deliver to the Public Printer, and that Congress agreed to buy and for which it appropriated a sum of money, that the respondent will immediately pay out to the petitioner the sum of ten thousand dollars as required in said act.

This respondent expressly disclaims to the Court that he, or any one for him, has attempted to sit as a literary or historical expert, or that he has attempted to criticise any particular features of the work submitted by the petitioner, and that he interposes any captious cavil thereto, but that he declines to pay the money appropriated by the Act solely because he is informed and believes that petitioner has not complied with the act in delivering the specific and particular manuscript referred to in the act, and for which alone Congress intended to appropriate the sum of ten thousand dollars.

Your respondent, therefore, prays that he may be dismissed hence, with his reasonable costs in this behalf sustained.

JAMES B. REYNOLDS,
Acting Secretary of the Treasury.

36 DISTRICT OF COLUMBIA, *City of Washington, ss:*

James B. Reynolds, being first duly sworn, says that he is the Assistant Secretary of the Treasury and the Acting Secretary in this behalf; that he has read the foregoing return to the rule to show cause and the petition filed herein, which he has subscribed and knows the contents thereof; that the matters and things therein stated to his personal knowledge are true, and those stated on information and belief he believes to be true.

JAMES B. REYNOLDS.

Subscribed and sworn to this 28th day of December, A. D., 1907.

JAS. N. FITZPATRICK,
[SEAL.] *Notary Public.*

Demurrer.

Filed January 7, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 50034.

UNITED STATES OF AMERICA on the Relation of FRANCIS N. THORPE, Petitioner,
vs.
GEORGE B. CORTELYOU, Secretary of the Treasury, Respondent.

Now comes the plaintiff and says, the return of the defendant to the rule to show cause is bad in substance.

37 NOTE.—Among the points of law to be argued on this demurrer is, that the provision of the Act of Congress entitled

an Act making appropriations for Sundry Civil expenses of the Government for the year ending June 30th, 1907, is, "For the purchase from Professor Francis N. Thorpe of the manuscript for a new edition of charters, constitutions, and organic laws of all the States, Territories, and colonies now or heretofore forming the United States, and any Acts of Congress relating thereto, prepared by him, ten thousand dollars: Provided, That he shall prepare a complete index of the work and do all proof reading in connection with the preparation, printing, and publication thereof," and the denial by the respondent that the manuscript furnished by said Thorpe, with a complete index prepared by him and proof read, as provided in said Act, is not the manuscript referred to in said Act and intended to be purchased by Congress, because the respondent is informed by a member of Congress that it was understood by him and others that the Government would receive, in the event of the purchase of the Thorpe manuscript, the benefit of the collaboration with the petitioner of Dr. Benjamin F. Shambaugh, Professor of History in the University of Iowa, is not a sufficient denial of, or answer to the claims of the petitioner, and is not pertinent to the issue in this cause.

HAMPTON L. CARSON.
GEORGE E. HAMILTON,
Attorneys for Petitioner.

Endorsed.

38 It seems to me indisputable, that the return denies that the physical thing delivered to the Public Printer, was the identical subject-matter described in the Act of Congress, and therefore presents an issue of fact upon at least this point. The demurrer is overruled.

WRIGHT.

Supreme Court of the District of Columbia.

TUESDAY, *January* 28, 1908.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

At Law. No. 50034.

UNITED STATES OF AMERICA *ex Rel.* FRANCIS N. THORPE, Petitioner,
vs.
GEORGE B. CORTELYOU, Secretary of the Treasury, Respondent.

Upon hearing the petitioner's demurrer to the return of the Respondent, it is considered that said demurrer be, and it is hereby overruled.

39 *Traverse to the Answer.*

Filed February 25, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50034.

UNITED STATES OF AMERICA on the Relation of FRANCIS N. THORPE, Petitioner,

vs.

GEORGE B. CORTELYOU, Secretary of the Treasury, Respondent.

The Relator, Francis N. Thorpe, by way of traverse to the Return filed herein by the Respondent, James B. Reynolds, Acting Secretary of the Treasury, denies each and every averment of said Return, which alleges that the manuscript delivered by the Relator was any other than the identical manuscript purchased by Congress in the act approved June 30, 1906, entitled "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Year Ending June 30, 1907" and denies each and every material averment in said petition which alleges that the manuscript actually delivered by the Relator was any other than the identical manuscript which he agreed to sell and deliver to the United States Government, and which alleges that the manuscript delivered is not the manuscript intended to be purchased by the Government in the act referred to; on the contrary he avers that the manuscript delivered was the only manuscript ever brought by this Relator to the attention of Congress.

40 and was the identical manuscript which Congress purchased and intended to purchase in the act referred to, and on this traverse the Relator tenders issue.

I do solemnly swear that I have read the foregoing traverse by me subscribed and know the contents thereof; that the matters and things therein stated on personal knowledge are true, and those stated on information and belief I believe to be true.

FRANCIS N. THORPE.

Subscribed and sworn to before me this 24th day of February, A. D. 1908.

HARRY F. AMBLER,
Notary Public.

[SEAL.]

Commission expires Feb. 23, 1909.

HAMPTON L. CARSON,
GEORGE E. HAMILTON,
For Relator.

Affidavit (Notary).

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

I, Craig Biddle, Prothonotary of the County of Philadelphia and Clerk of the Courts of Common Pleas of said County, which [SEAL.] are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following Certificate, do certify, That Harry F. Ambler Esquire, before whom the annexed affidavit was made, was at the time of so doing a Notary Public for the Commonwealth of 41 Pennsylvania, residing in the County of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements, and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere: and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 24th day of Feb'y in the year of our Lord one thousand nine hundred and eight (1908).

CRAIG BIDDLE,
Prothonotary.

42 *Motion to Deny the Writ of Mandamus, &c.*

Filed March 26, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50034.

UNITED STATES OF AMERICA on Relation of FRANCIS N. THORPE, Petitioner,

vs.

GEORGE B. CORTELYOU, Secretary of the Treasury, Respondent.

Now comes the respondent, and referring to his return filed herein and the traverse of relator to said return, moves the Court to deny the writ of mandamus, discharge the rule and dismiss the petition of the relator, upon the grounds, among others, following:

1. The traverse attempts to raise and try issues involving disputed questions of law and fact, not properly triable in mandamus proceedings.

2. It appears from the traverse of relator that the relator is attempting to sue the United States on a contract, and there is no jurisdic-

tion in this Court to entertain a suit against the United States for breach of contract.

3. It appears from the proceedings herein that the duty of the Secretary of the Treasury, respondent, in the premises is not merely ministerial, but involves the exercise of discretion and judg-
43 ment upon mixed questions of law and fact.

4. It appears from the traverse that the act sought to have respondent required to perform is not a merely ministerial act, but the fulfillment of a contract claimed to exist by the relator between him and the United States. The return sets out that relator has not complied with the contract, and the traverse claims he has complied with said contract, and the question whether he has complied with the contract, *vel non* is one triable, if anywhere, in the Court of Claims, and this Court is without jurisdiction to determine such issues in mandamus proceedings.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia, Attorney for Respondent.

Order Denying Motion to Dismiss Petition, &c.

Filed April 24, 1908.

In the Supreme Court of the District of Columbia.

At Law. 50034.

UNITED STATES *ex Rel.* FRANCIS N. THORPE, Relator,
vs.
GEORGE B. CORTELYOU, Respondent.

Upon consideration of the motion of respondent filed herein to deny the writ, discharge the rule to show cause and dismiss the petition, it is this 24th day of April 1908 ordered that said
44 motion be and it hereby is denied.

By the Court

WRIGHT, *Justice.*

Order Allowing Special Appeal.

Filed May 22, 1908.

Court of Appeals of the District of Columbia.

No. 298, Original Docket, April Term, 1908.

Law. No. 50034.

GEORGE B. CORTELYOU, Appellant,
vs.
UNITED STATES *ex Rel.* FRANCIS N. THORPE.

On consideration of the petition of George B. Cortelyou, Secretary of the Treasury, for the allowance of a special appeal in the above entitled cause from the order of the Supreme Court of the District of Columbia in said cause overruling his motion to deny the writ of mandamus and dismiss the petition. It is by the Court this day ordered that said petition be, and the same is hereby, allowed.

Per Mr. CHIEF JUSTICE SHEPARD,
May 22, 1908.

A true Copy
Test:
[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

45 *Directions to Clerk for Preparation of Transcript of Record.*

Filed May 26, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50034.

UNITED STATES *ex Rel.* FRANCIS N. THORPE
vs.
GEORGE B. CORTELYOU.

The respondent hereby designates the following papers and pleadings to constitute the transcript of record of the special appeal to the Court of Appeals allowed by order of the Court, May 22, 1908:

1. Petition of relator for the writ of mandamus;
2. Rule to show cause;
3. The answer of respondent;
4. The demurrer to the answer;
5. The order overruling demurrer;
6. The traverse of answer;

7. The motion to dismiss petition, discharge rule and deny writ filed March 26, 1908;
8. The order of April 24, 1908, denying motion to dismiss petition, discharge rule and deny writ filed March 26, 1908; and
9. This order.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

46 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 45 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50034, At Law, wherein United States of America, on the relation of Francis N. Thorpe, is Petitioner and George B. Cortelyou, Secretary of the Treasury, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 12th day of June, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1912. George B. Cortelyou, Secretary of the Treasury, appellant, *vs.* United States of America on the relation of Francis N. Thorpe. Court of Appeals, District of Columbia. Filed Jun- 13, 1908. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1908.

No. 1912.
No. 6, Special Calendar.

GEORGE B. CORTELYOU, SECRETARY OF THE TREASURY, APPELLANT,

vs.

UNITED STATES OF AMERICA EX RELATIONE FRANCIS N. THORPE, APPELLEE.

DANIEL W. BAKER,
United States Attorney.

STUART McNAMARA,
Asst. United States Attorney.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1908.

No. 1912.
No. 6, Special Calendar.

GEORGE B. CORTELYOU, SECRETARY OF THE TREASURY, APPELLANT,

vs.

UNITED STATES OF AMERICA EX RELATIONE FRANCIS N. THORPE, APPELLEE.

Statement of the Case.

This is an appeal from the order of the court below overruling the motion of appellant to dismiss the petition of relator and deny the writ of mandamus.

On December 12, 1907, appellee filed his petition in the Supreme Court of the District of Columbia, praying that the writ of mandamus issue against appellant to compel him to pay ten thousand dollars ($10,000) to appellee. The petition (Rec., pp. 1 and 2) sets out that appellee had been engaged for years in special statutes in constitutional law, colonial charters and the like, and that he had presented to Congress on January 20, 1897, a memorial stating the material omissions of the extant work on those subjects known as the Ben Perley Poore compilation and seeking the adoption of his work by

Congress, it being alleged to be a new and complete edition of the charters, constitutions, and organic laws of the United States. The petition states that after successive efforts during the ensuing years the matter was so proceeded with that by an act of Congress entitled "An Act making appropriations for sundry civil expenses of the Government for the year ending June 30, 1906," it was enacted by the Senate and House of Representatives that the following sums be, and the same are hereby, appropriated inter alia, as follows:

> "Charters and Constitutions.—For the purchase from Professor Francis N. Thorpe of the manuscript for a new edition of charters, constitutions, and organic laws of all the States, Territories, and Colonies now or heretofore forming the United States, and any acts of Congress relating thereto, prepared by him, ten thousand dollars; *provided* that he shall prepare a complete index of the work and do all proof-reading in connection with the preparation, printing, and publication thereof; and the Public Printer shall print and bind six thousand copies of the work, of which two thousand shall be for the use of the Senate and four thousand for the use of the House of Representatives" (Rec., p. 2).

The foregoing act was approved June 30, 1906.

The petition then details certain correspondence had by Professor Thorpe with the officials of the Treasury and with the Public Printer with reference to his procedure in the work of preparing the edition of charters, constitutions, etc., for printing. It appears that on May 13, 1907, Professor Thorpe sent to the Public Printer a manuscript of "Charters, Constitutions, and Organic Laws," accompanied by a letter of transmission explaining the corrections in the manuscript and stating that it contained 5,000 pages, more or less, and had been in the process of preparation since 1885. Petitioner re-

ceived from the Public Printer, on the same date, a receipt, as follows:

> "Received of Professor Francis N. Thorpe, of Mount Holly, New Jersey, a manuscript copy said to contain charters, constitutions, and organic laws, except the index, subject to the conditions provided for in the act of June 30, 1906."

This receipt was signed by the Public Printer (Rec., p. 5).

Petitioner claimed that he had faithfully complied with the requirements of the act of Congress, that he has received, corrected and returned to the Public Printer the galley proofs and page proofs of the work, and that he has prepared a complete index of the work and has read and returned the proof in connection with the preparation, printing and publication thereof. He thereupon claims that he is entitled to receive the sum of $10,000, and that he wrote to the Secretary of the Treasury requesting payment, in reply to which letter he was advised, on October 14, 1907, by the Acting Secretary of the Treasury, that his communication was received and the matter of payment would be determined without unnecessary delay (Rec., p. 11).

Thereafter, on October 30, 1907, petitioner was further advised by the Acting Secretary of the Treasury, that as the act of Congress providing for the purchase of the manuscript of the new edition of charters, constitutions and organic laws was silent as to the official certification of the Treasury as a basis for payment of the sum appropriated, the Treasury would be obliged to await the further direction of Congress, since questions regarding the genuineness and identity of the manuscript had been presented to the Treasury, and these appeared to be questions solely for Congress or its committees to decide. He was further advised by the same official

that the Treasury Department would bring to the attention of Congress or its committees the objections which had been made, for it to pass upon the question of whether petitioner had or had not performed the work provided for in the act (Rec., p. 12).

The petitioner claims further that the Secretary of the Treasury has no discretion whatever in the matter and that his work is not subject to the approval of the Secretary of the Treasury, of a committee of Congress, or of Congress itself; that the transaction was one of purchase and sale, and that he has done all required of him under the law (Rec., p. 13).

The rule to show cause was issued on this petition, and the respondent made answer by the Acting Secretary of the Treasury, as follows:

It is not known whether petitioner presented a petition to Congress for the publication of the charters, constitutions and organic laws of the United States setting forth the omissions in the Ben Perley Poore edition, but respondent says that on information and belief petitioner, some ten years ago, did present such a petition to Congress and attempted to have Congress adopt his petition and purchase his work, but Congress declined to make such a purchase and the petitioner's efforts thereupon failed. Respondent says that it is not true that petitioner presented this memorial to Congress as the result of which the provision in the sundry civil act approved June 30, 1906, was passed, but that the fact is that no memorial of petitioner was presented to the Fifty-ninth Congress, nor was any previous petition or memorial submitted by petitioner some years ago re-presented to Congress at this time (Rec., p. 15). On the contrary, respondent represents that the question of the advisability and desirability of the purchase of some new edition of charters, constitutions and organic laws of all the States, Terri-

tories and Colonies then or heretofore forming the Union, and the acts of Congress pertinent thereto, originated in the lower House of Congress. It was desired to obtain an edition on this important subject which would be sufficiently contemporaneous in point of time with present conditions and which would contain complete information on such matters. The then extant work of Ben Perley Poore was thirty years old and thus wholly inadequate and incomplete with respect to the charters, constitutions and organic laws of all the States in so far as changes have occurred in those in existence at the time of the Ben Perley Poore work, and wholly inadequate with reference to States newly admitted to the Union, Territories organized and Colonies acquired thereafter. After originating in the House, negotiations were begun to purchase a manuscript for such a new edition, and the petitioner herein sought for the purchase of his work, which he represented would be a definite, distinct and new edition along these lines, which he had been preparing for some time, and which, before his final submission to the Government, in the event of its purchase by the Government, would receive the benefit of the collaboration with the petitioner of Dr. Benjamin F. Shambaugh, Professor of History in the University of Iowa and an historical scholar who had given much attention to specialization on these subjects (Rec., p. 15). Accordingly, the work, treatise or manuscript represented by the petitioner to Congress as the work to be delivered to the Government in the event of its purchase thereof was not *any* manuscript for a new edition of the constitutions, charters and organic laws nor any edition thereof which the petitioner might have, but was a definite, distinct, and particular manuscript, then represented and described to Congress by the petitioner at the time of these negotiations prior to the passage of the

act approved June 30, 1906. It was an individualized literary entity, distinctly identified, offered on one side by petitioner for sale, and being considered by Congress on the other side for purchase. In it the petitioner represented there would be found a new and, therefore, complete edition of all the charters, constitutions, and organic laws, and the work thus offered for sale constituted a specific and distinctly featured literary entity, it being represented to be both a new edition of this old subject and one as to some parts of which Professor Shambaugh had collaborated with petitioner and the whole prepared by him. This being offered for sale to Congress, Congress relied upon the purchase and the acquisition of this specific thing and agreed to purchase the same, and for it alone appropriated the sum of $10,000, as heretofore described, in the sundry civil act approved June 30, 1906 (Rec., p. 16).

The answer proceeds to set forth that it is true the petitioner had some correspondence with the Public Printer, but he denies that the petitioner has complied with the act of Congress and with the true intent and meaning thereof; he denies that he has delivered to the Public Printer, as claimed by petitioner in the letter referred to in this paragraph, the manuscript described in said letter. He admits that the Public Printer delivered to petitioner a receipt for the manuscript the Public Printer received from petitioner, but the answer states that such a receipt is merely for the physical thing delivered to the Public Printer and is in no manner a certificate of the compliance by the petitioner with the act of Congress in delivering to the Public Printer the particular and identical manuscript represented by petitioner to Congress (Rec., p. 17). The answer denies that the petitioner has thoroughly complied with the requirements of the act of Congress. It admits that the petitioner has received, corrected and returned to the Pub-

lic Printer the galley proofs and page proofs of certain manuscripts and papers which he, the petitioner, had previously delivered to the Public Printer, but denies that the petitioner has either delivered to the Public Printer the identical manuscript which was represented by petitioner to Congress as the manuscript Congress was to buy, or that he has corrected and returned the galley proofs or page proofs of this identical manuscript or prepared an index of the same, or that petitioner has done all the proof-reading in connection with the printing and publication of this identical manuscript which Congress agreed to buy. The answer denies that this manuscript which Congress agreed to buy is now in type, in five volumes, with the title pages as set out in the eighth paragraph of the petition, and denies that such identical work was ever delivered to the Public Printer or to any Government officer (Rec., p. 17). The answer further avers that while the Public Printer sent such a receipt as is set out in the ninth paragraph of the petition to the Secretary of the Treasury, this has not the effect which the petitioner claims it has. It does not operate to prove any compliance by petitioner with the act of Congress approved June 30, 1906. The answer declares that the duty of the Public Printer under this act is simple and specific. It is the single duty of printing and binding these six thousand copies. It is not within the province of the Public Printer to pass upon the work, and his certificate proves nothing more than that he received a certain physical thing, called a manuscript, purporting to be a treatise of charters, constitutions, and organic laws; and the answer finally denies that the work submitted to the Public Printer, and to which the certificate refers, was the identical work Congress agreed to buy (Rec., p. 18).

But, further answering, the answer declares that at the time the Public Printer rendered the certificate or receipt

to the petitioner aforesaid he wrote the Secretary of the Treasury, stating that he had received a certain manuscript from the petitioner, and that the quality of the manuscript, its accuracy, and its completeness had been brought into question. He did not feel that any discretion had been lodged in him to assert his own opinion thereof, if he had one, so he proceeded with the typesetting in order that the proofs might be furnished to the author and that he might not be deprived of the opportunity to complete his undertaking. He therefore brought the matter to the attention of the Secretary of the Treasury merely to afford him, as the official charged with the disbursement of the money, the opportunity to examine the objections which had been raised and to determine for himself their weight and importance (Rec., pp. 18 and 19).

It is further set out in the answer that after the petitioner had delivered the said manuscript to the Public Printer it was discovered by a member of the House of Representatives, who was active in Congress in negotiating the purchase of the work provided for in the aforesaid act and who was thoroughly familiar with all of the details leading to the passage thereof and to whom a definite outline of the particular manuscript agreed to be purchased was exhibited at the time of the making of the legislative contract to purchase, that the manuscript submitted to the Public Printer and received by him was not the identical manuscript nor the identical specific individual thing which Congress agreed to buy and for whose purchase it appropriated $10,000. The manuscript delivered to the Public Printer, the answer states, was not the new edition represented to Congress, and the collaboration of Professor Shambaugh was wholly omitted in the manuscript delivered. The act of Congress above referred to being silent as to a provision for official certification that the work as delivered is the identical work agreed to be purchased, the Secretary of

the Treasury was notified by a member of Congress, on behalf of Congress, that the work as submitted by the petitioner was not the identical work submitted to Congress and agreed to be bought by it, and that the same was not accepted.

The answer states that the Secretary of the Treasury does not attempt to sit as a literary or historical critic, nor to advance his own opinions about the character of the work, but that in his discretion as the Secretary of the Treasury and the officer charged with the proper husbanding of public funds, he having learned, and on information and belief knowing, that the manuscript delivered by the petitioner to the Public Printer is not the identical manuscript agreed to be bought in the legislative contract embodied in the act approved June 30, 1906, he has refrained from paying out the said $10,000 until the money could be properly paid out when the contract aforesaid is properly performed (Rec., p. 20). Whenever the petitioner has complied with the terms and intent of said act and delivered the said identical specific manuscript which was represented to Congress, and which Congress agreed to buy, and for which this money was appropriated, the appellant, the Secretary of the Treasury, will pay out to the petitioner the sum mentioned in the act (Rec., p. 21).

To this answer the petitioner demurred on the ground that the answer constituted no defense to the petition (Rec., pp. 21 and 22). This demurrer was overruled, and the petitioner proceeded thereupon to traverse the answer (Rec., p. 23) in each and every averment which alleged that the manuscript delivered by the relator was any other than the identical manuscript purchased by Congress in the act approved June 30, 1906, and avers on the contrary that the manuscript delivered was the only manuscript ever brought by the relator to the attention of Congress and was the identical manuscript

which Congress purchased and intended to purchase in the act referred to, tendering issue on his traverse (Rec., p. 23).

Finding that the relator was thus attempting to try a suit on a breach of contract against the United States through mandamus proceedings in the Supreme Court of the District, your appellant filed a motion to dismiss the petition (Rec., p. 24) on the grounds that the traverse attempted to raise and try issues involving disputed questions of law and fact not tryable in mandamus; that the relator was attempting to sue the United States on the contract when there was no jurisdiction in the court below for such a suit; that the duty of the Secretary of the Treasury in the premises was not merely ministerial, but involved the exercise of discretion and judgment upon mixed questions of law and fact, and the petition therefore showed no ground for the issuance of mandamus; and finally, that the purpose of the traverse was to obtain in mandamus proceedings the fulfillment of a contract claimed to exist by the relator between himself and the United States. The return set out that the relator has not complied with the contract and that relator claims he has complied with the contract, and the question whether he has or has not is one tryable, if anywhere, in the Court of Claims, and the court below was without jurisdiction to determine these issues in mandamus proceedings (Rec., p. 25).

It was explained to the court that under the practice in mandamus it is not permissible to demur to the petition, and this was, therefore, the earliest time when the respondent, the Secretary of the Treasury, could raise such questions in the case.

The court below overruled such motion (Rec., p. 25), and the matter was then brought by special appeal to this court.

Assignment of Errors.

First. The court erred in overruling the motion to dismiss the petition and deny the writ of mandamus.

Second. The court erred in holding that he had jurisdiction to try the issue attempted to be raised by the traverse of relator.

Third. The court erred in holding that the action herein lies against the Secretary of the Treasury.

ARGUMENT.

It is contended by the appellee that the relation of the United States to him in this case is that of a legislative contract. The transaction, it is claimed, was one of bargain and sale. The appellee had something to sell which the Government desired to buy, and in the execution of such negotiation the provision was inserted in the act approved June 30, 1906, providing for the purchase of the manuscript for the sum of $10,000, and thus the legislative contract was made.

Accepting this contention, let us see if there be jurisdiction to assert the rights of the appellee under such contract in mandamus proceedings in the Supreme Court of the District of Columbia.

It is well settled that the contracts of the United States, in the absence of special provisions to the contrary, are to be treated as ordinary contracts.

Wells, Fargo Co. *vs.* U. S., 45 Fed., 337.
Allen *vs.* U. S., 28 C. C., 141.

Hence, the present suit is one where the appellee comes to court saying he has performed his contract and he demands his money, while the appellant says, in behalf of the Government, that the appellee has not

performed his contract and is not entitled to the money It is a suit against the Government upon breach of contract. The question arising *in limine* is one of jurisdiction. Apart from the desirability of entertaining such suits, the courts must view the matter from the standpoint of the constitutional limitations of their own jurisdiction, and ascertain at the outset whether they have any jurisdiction over the subject-matter of such a suit when presented in the form of action and in the tribunal in which this case is attempted to be tried.

There is no Jurisdiction in the Court Below to Entertain This Suit.

Under the practice prescribed in mandamus proceedings it is not permissible to demur to the petition, and the question of the jurisdiction of the court to hear the petition in this case was raised at the earliest moment by the motion to dismiss after the return had been held sufficient in point of law.

The present case is one against the United States. The object of the suit is to require the payment out of the Treasury of the United States of $10,000 as a consideration of the contract which the appellee claims exists between him and the Government and which he has performed. The appellant as an individual obviously has no interest in the suit. He is sued merely because, by virtue of his position as Secretary of the Treasury, he controls the disbursement of public moneys and is the agent of the Government in that behalf. The mere entitling of the case against the Secretary of the Treasury does not conceal the character of the case as being one against the United States, as the Supreme Court of the United States has said:

> "The question whether the United States is a party to the controversy is not determined by the

> mere nominal party on the record, but by the question of the effect of the judgment or decree which can be entered."
>
> Minnesota *vs.* Hitchcock, 185 U. S., 375.

The proceedings, therefore, are precisely the same as if they should be entitled in the name of the United States itself.

Passing from the style of the case to the subject-matter, it appears even more strongly that the mandamus sought is, in reality, prayed against the Government itself. What is the effect of the judgment which the appellee desires to obtain? The avowed purpose of the petition is to obtain some order of the court requiring the Government to live up to its contract. The aim of the suit is to establish the liability of the Government—to compel the Government to pay the sum of $10,000. Obviously, it is a suit filed to compel the Government to perform specifically a certain contract and to pay out the consideration therefor. If the suit were filed directly against the United States with such a purpose in mandamus proceedings in the Supreme Court of the District of Columbia, certainly it could not be maintained. And, by the same token, where the Government is immune from suit directly, there is an equal interdiction upon proceedings against its officers to accomplish the same end indirectly.

The Supreme Court has had occasion to pass upon attempts to sue the State or National governments in this indirect way. Thus it has decided that a bill filed for the specific performance of a contract between the complainants and the State of South Carolina, although the State was not in name made a party defendant, yet showed that it was the actual party to the alleged contract, the performance of which was sought, and the only party by whom it could be performed was the State.

The suit was therefore in effect one against the State, as the very things required to be done by the actual defendants were the things which when done would constitute a performance of the alleged contract by the State.

Hagood *vs.* Southern, 117 U. S., 52, 67.

The same court further decided that a bill in equity brought against officers of a State, who, as individuals, have no personal interest in the subject-matter of the suit and defend only as representing the State, where the relief prayed for, if done, would constitute a performance by the State of the alleged conduct of the State, was a suit against the State.

In re Ayers, 123 U. S., 443.

In its last utterance upon this question the Supreme Court has said:

> "A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract by directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and the decree in favor of plaintiff would affect the treasury of the State."
>
> Ex parte Young, 209 U. S., 123, 151.

Applying that precise language to the case at bar, how clearly it appears that the Government alone has any interest in this case, and a judgment in favor of plaintiff would affect its treasury. The effect of this judgment which is sought is to affect the Treasury of the United States by compelling the withdrawal therefrom of the sum of $10,000.

This question of jurisdiction is necessary and inevitable because of the fact that the Government has yielded its sovereignty to suit only in certain cases and under certain prescription.

It is not contended that the appellee has no rights in the premises and that he has not the right to assert his claim in the proper proceeding and before the proper tribunal, but it is claimed that there is no warrant of law for the institution of mandamus proceedings in the Supreme Court of the District of Columbia to try the question of the performance of the breach of a contract with the Government and to compel the Government, by such proceedings, to liquidate its liability and pay out money from the public Treasury.

Congress has provided the methods with which the liability of the Government may be put in suit, and has specified its courts where its sovereignty is amenable to suit. The relief which the appellee seeks is not obtainable in the Supreme Court of the District of Columbia, wherein Congress has not vouchsafed the citizens the right to sue the Government, but in the Court of Claims or by an appropriate appeal to Congress itself.

II.

The Writ of Mandamus is Not the Proper Remedy.

The writ of mandamus is an extraordinary remedy applicable only in certain cases. It does not lie where the duty sought to be enjoined is discretionary or where the right to the performance of the act prayed for is not established or clear. The right to the performance of the act must exist before the filing of the petition. The proceeding of mandamus can not be used first to try and establish the existence of that right and then have the writ issue in the very proceedings to command the performance of the act. This is the rule even in cases where the mandamus is sought by one citizen against another. When we pass from the rule even in those cases to the rule in cases where the citizen seeks to mandamus the Government through the medium of one of its officers, it is so well established by a long line of cases (Marquez *vs.* Frisby,

101 U. S., 473–475; U. S. *vs.* Schurz, 102 U. S., 378–395; Blockfinger *vs.* Foster, 190 U. S., 116–126) that the right must exist both as to the act sought to be performed and the tribunal in which such right is asserted, that there is now no doubt that no suit will lie in the ordinary court of justice to mandamus the Government through the indirection of a suit against its officer, unless the act to be performed is purely ministerial or there be some specific provision of law authorizing suit in such court. Were it otherwise, the actual result would be that the Government could be sued at any time in any court by the mere filing of a petition for a mandamus against its officer. The present case is a type of the suits possible in such a condition. A claimant who imagines himself entitled to a sum of money due upon a contract, upon a claim of any kind, or damage sustained in any way, would be entitled to implead the Government by a suit against the officer representing the particular Department of the Government out of which the grievance of the petitioner arose.

III.

The Writ is not Grantable Where the Return Shows That There are Contested Questions of Law and Fact by Reason of Which the Respondent has the Officer of the United States Declines to Comply With the Demand of the Petitioner.

It is submitted that in the present case the return shows sufficient ground for the dismissal of the petition and the denial of the writ. By reason of the return, the right of the petitioner to the performance of the act sought does not appear to be clear. It is not uncontested, and this is true apart from the question that in the present court there is no jurisdiction for the trial of that right. The answer sets out that the relator has not

performed the contract the payment of the consideration of which he now demands, because he has not delivered the specific thing which Congress agreed to buy and for the purchase of which it entered into a legislative contract embodied in the act approved June 30, 1906. The answer sets forth that the manuscript bought by Congress under such act was an identical, specific, individualized literary entity; that the relator has not performed this contract by delivering this specific physical thing, and that accordingly the Government will not pay the $10,000 which it agreed to pay alone for such particular identical manuscript. It is submitted that the answer setting forth these questions of law and fact which the Secretary of the Treasury, as the officer of the Government charged with the disbursement of public funds, is required to decide, shows sufficient ground for the dismissal of the petition. It shows conclusively that the act sought to be performed is not purely ministerial. It is an act resting largely in the discretion of the Secretary.

A case involving facts very similar to these arose some time ago, in the same way. Action was filed in the Supreme Court of the District seeking the issuance of a writ of mandamus against William Windom, then Secretary of the Treasury, and praying that he be commanded to pay out to the relator the sum of $12,536.00 claimed to be due upon a contract between the relator and the Government. The contractor had furnished material and performed labor for the United States under contract, and when the work was done and the materials furnished he presented his account to the proper officer for adjustment and settlement. The balance was found to be correct so far as the labor and materials were concerned; but it was also found that through penalties and forfeitures that balance was liable to be materially reduced. It also appeared that the contractor was indebted to

mechanics, etc., for work done and materials furnished under his contract. The Treasury officials agreed with the contractor that the account should be adjusted without enforcing the penalties and forfeitures if he would consent that the said indebtedness should be paid out of the sum so allowed, and that the control of the money should not be given up until these claims were satisfied. He assented and a draft was prepared. He did not comply with these conditions, but instead applied to the Supreme Court of the District for a writ of mandamus to compel the Secretary of the Treasury to pay him the sum due on the contract. The officer made return setting forth facts similar to the facts embodied in the return in this case, and the Supreme Court in passing upon the sufficiency of the return and the propriety of the action of the court below in dismissing the petition and denying the writ, said:

> "We think that this return showed sufficient cause for the discharge of the rule and the refusal to issue the writ. It certainly raised disputed questions of law and fact, as to the amount of the actual indebtedness of the United States to Mitchell; as to his agreement that the draft should not be delivered until the claims of subcontractors, mechanics, and materialmen should be satisfied out of the proceeds of said draft; as to whether the remission of the forfeitures was absolute or conditional; as to the validity of such agreement; and as to the legal effect of Mitchell's non-fulfillment of contract. We agree with the court below that these disputed questions of law and fact should not be tried in this proceeding; and that this is not a case in which the power of the court should be exercised."

United States ex rel. Redfield *vs.* Windom, 137 U. S., 636–646.

See, also, State *vs.* Durham, 4 Mackay, 235.

The action of mandamus was not designed, nor has it ever been applied, as a remedy to try a breach of contract, or as a means to collect a debt.

Mayer *vs.* City of New York, 25 Wendell, 680.
People *vs.* Thompson, 25 Barb., 73.
State *vs.* Howard County, 39 Missouri, 375.

It is not the contention of this brief that the relator is remediless; it is only claimed that he has misconceived his remedy and his court. The limitations of jurisdiction are constitutional. He has his remedy in the forum where Congress has permitted the sovereignty of the Government to be put in suit, or by an appeal to that very branch of government where his contract arose, and which is empowered to decide his performance and his action thereunder. It is therefore respectfully submitted that the order of the court below should be reversed and that the said court should be directed to dismiss the petition and deny the writ.

Respectfully submitted.

DANIEL W. BAKER,
United States Attorney.
STUART McNAMARA,
Asst. United States Attorney.

No. 1912. OCTOBER TERM, 1908.

IN THE

Court of Appeals, District of Columbia

No. 6. SPECIAL CALENDER.

GEORGE B. CORTELYOU, SECRETARY OF THE TREASURY, APPELLANT,

vs.

UNITED STATES OF AMERICA ON THE RELATION OF FRANCIS N. THORPE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF ARGUMENT IN BEHALF OF APPELLEE.

HAMPTON L. CARSON,
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JOHN W. YERKES,
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Allen, Lane & Scott, Prs., Phila.

COURT OF APPEALS, DISTRICT OF COLUMBIA.

No. 1912. October Term, 1908.

No. 6. Special Calendar.

George B. Cortelyou, Secretary of the Treasury, Appellant,

vs.

United States of America on the Relation of Francis N. Thorpe, Appellee.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF ARGUMENT IN BEHALF OF APPELLEE.

This appeal involves the consideration by this Court of the correctness of the action of the court below in denying the motion of the respondent to deny the writ of mandamus, discharge the rule to show cause, and dismiss the petition of the relator. The motion was a most unusual one, and was made at a belated stage, for the rule had been allowed upon petition, an answer had been filed by the respondent, followed by a demurrer

to the answer, which, being overruled after argument, was followed by a traverse of the return, and issue was joined upon the point designated by the court, and the case stood ready for trial. We contend that there was no error, and that the case can be properly tried in the court below.

As the respondent in making his motion has referred expressly to his answer and to the traverse of the relator, which are unintelligible without a consideration of the petition itself, it follows that the whole case is brought under review as a proper one for the remedy by mandamus and trial in the Supreme Court of the District of Columbia.

We will preface our argument by an analysis of the record, of the pleadings in particular, and review the nature of the case in general.

I. GENERAL ANALYSIS OF RECORD.

This case originated in a petition by Francis N. Thorpe for a writ of mandamus to be directed to George B. Cortelyou, Secretary of the Treasury, commanding him to make payment to the petitioner of the sum of ten thousand dollars, and to draw his warrant in the usual way.

Thereupon a rule to show cause was granted, which was duly served and so returned.

The respondent filed an answer, to which the petitioner demurred. The demurrer was overruled, and the answer was traversed.

Thereupon respondent moved to deny the writ of mandamus, discharge the rule, and dismiss the petition of the relator.

This motion was denied.

This special appeal was then taken by the respondent.

II. ANALYSIS OF THE PLEADINGS.

PETITION.

(*a.*) *The petition* of the relator set forth, by way of inducement or introduction, that he had devoted himself specially to the study of State and Constitutional law, Colonial charters, Constitutions and organic laws of the United States, and, after years of labor, had prepared and presented to the Congress of the United States a manuscript prepared by himself supplying the omissions of the Compilation known as the Ben Perley Poore Compilation.

(*b.*) The matter, in the course of years, was so proceeded with as to result definitely in Congressional action in the shape of the following clause, enacted by the Senate and House of Representatives of the United States of America, duly approved June 30th, 1906, as a part of the Act of Congress entitled "An Act Making Appropriations for Sundry Civil Expenses of the Government for the year ending June 30th, 1907":—

> "*Charters and Constitutions: For the purchase from Professor Francis N. Thorpe of the manuscript* for a new edition of Charters, Constitutions, and organic laws of all the States, Territories, and colonies now or heretofore forming the United States, and any acts of Congress relating thereto, *prepared by him*, ten thousand dollars; Provided, that *he* shall prepare a complete index of the work and do all proof reading in connection with the preparation, printing and publication thereof, and the Public Printer shall print and bind six thousand copies of the work, of which two thousand copies shall be for the use of the House of Representatives."

(*c.*) Various steps in the way of performance, inquiries and instructions as to the manner, method and time of procedure and payment are then set forth in the shape of correspondence between the relator and the Public Printer and the Assistant Secretary of the Treasury.

(*d.*) Relying upon these communications, and in accordance with the instructions of the Public Printer, the relator delivered his manuscript to the Public Printer and received his receipt.

(*e.*) The relator avers faithful compliance with all the requirements of the Act of Congress, *i.e.*, he has corrected and returned to the Public Printer the galley proofs, and page proofs; he has prepared a complete index of the work, and has read and returned the proof in connection with the preparation, printing and publication thereof, and the whole work is now in type in five volumes with title pages as set forth. (Transcript of Record, pages 6–10.)

(*f.*) The Public Printer has certified to the Secretary of the Treasury compliance on the part of the relator with all of the conditions or provisions of the Act. (Transcript of Record, page 11.)

(*g.*) The correspondence of the relator with the Secretary of the Treasury demanding payment and the refusal of the Secretary are then set forth. (*Ibid.*, pages 11–12.)

(*h.*) The relator then avers that he is advised that the Secretary of the Treasury is without discretion in the matter; that the Act of Congress of June 30th, 1906, appropriated a specific sum for a specific thing, which the relator had delivered; that the work is not subject to outside or inside critical approval; that the transaction was one of purchase and sale, and that the vendor having

done all that he was required to do, and having delivered the thing sold, he is now entitled to his money.

Hence the prayer for a mandamus.

A rule to show cause was then granted.

Analysis of Answer.

(*a.*) *Defects.* The answer or return of the respondent to the rule *does not deny* the terms of the Act of Congress; *it does not deny* that the relator is the Francis N. Thorpe mentioned in the Act; *it does not deny* that the manuscript was furnished by said Thorpe; *it does not deny* that the manuscript furnished was prepared by Thorpe; *it does not deny* that said Thorpe prepared the index and did the proof reading in connection with the preparation, printing and publication of the manuscript prepared by him; *it does not deny* that said Thorpe has complied with the language, requirements and provisions of the Federal statute making the appropriation; *it does not deny* that the Government has secured, accepted and put into type that for which the appropriation was made; *it does not deny* that the thing delivered met exactly the description given in the Act of Congress; *it does not deny* that the Public Printer received and printed the manuscript as received from, prepared by and revised, corrected, indexed and read in proof by the said Thorpe; *it does not deny* that the Public Printer certified to the Secretary of the Treasury compliance on the part of the relator with all of the requirements of the Act of Congress; *it does not deny* the requests of the relator for payment, and the refusal of the Secretary to pay.

Furthermore, the answer fails to exhibit any language in the said Appropriation Act of June 30th, 1906, or in any other act of Congress, or any circumstance, custom

or regulation which vests discretionary power in the Secretary of the Treasury to withhold payment.

(*b.*) *General Analysis of Answer.* Bearing in mind the foregoing defects of the answer, let it be viewed first generally, and then specifically. Viewed generally, the answer consists of an effort to change the subject matter of the contract by the subtle suggestion that Congress intended to buy something different from that described in the Act, and something different from that for which in express terms the appropriation was made. Coupled with this is the averment in substance that the thing delivered was not the thing intended to be bought. The effort is made to have the intentions of Congress tested, not by the language of the Act, but by the injection of negotiations relating to something else which was excluded by the definite and final words of the Act itself. The court will observe that it is not alleged that the thing delivered was something not described in the Act or that the thing delivered lacked something required by the Act; but that the thing *intended* to be bought was something different from that described in the Act. The success of such an effort to escape from the plain language of the Act must involve the impossible and illegal interpolation of words which Congress did not use. We take it that a court will adhere to the language of the Act as expressive, and conclusively expressive, of the intention of the parties. All previous negotiations, representations or offers are merged, and the consummation of the matter must stand.

(*c.*) *Special Analysis of Answer.* The first paragraph of the answer merely avows lack of knowledge on the part of the respondent of the extent and character of the relator's special studies in State Constitutional law, and

indirectly but very strongly corroborates the relator's statement of his efforts to bring the matter to the attention of Congress during a series of years. The matter is wholly immaterial except by way of inducement, and as to this, certainty to a common intent is all that is required. The same remark may be predicated of paragraph 2 of the answer so far as it purports to give an account of relator's efforts to have the matter acted on. So far as the remaining portion of the second paragraph of the answer is concerned, we will consider it hereafter in connection with paragraphs 7, 8, 10, and 11, so as to avoid repetition.

Paragraphs 3, 4, 5, 6, and 9 substantially admit the corresponding allegations of the relator, and call for no comment except to urge that the injection into the ninth paragraph of the letter of the Public Printer to the Secretary of the Treasury does not create a situation calling for the exercise of discretion on the part of the Secretary, as Congress had not provided that the Secretary or any one else should pass upon "the quality of the manuscript" (that is, its accuracy and completeness).

Paragraphs 2, 7, 8, 10, and 11 of the answer must be read together, as they relate to the same matter and contain the meat of the response. In total disregard of the express language of the appropriation Act—"*for the purchase from Professor Francis N. Thorpe* of the manuscript * * * *prepared by him* * * * Provided that *he* shall prepare a complete index," etc. (see Act quoted *in extenso*, Transcript of Record, page 2, and admitted to be as quoted in Respondent's Answer, Transcript of Record, page 18)—the effort is made, under the guise of an account of the steps taken in the House in the shape of negotiations prior to the passage

of the Act, to describe the manuscript as one which "would receive the benefit of the collaboration with the petitioner of Dr. Benjamin F. Shambaugh, Professor of History of the University of Iowa" (Transcript of Record, page 15), and the inference is drawn: "accordingly the work, treatise or manuscript represented by the petitioner to Congress as the work to be delivered to the Government in the event of its purchase thereof * * * was an individualized literary entity," and "* * * was to contain certain editing and revision by Professor Shambaugh" (Transcript of Record, page 16). This main feature of paragraph 2 of the answer controls the allegations of the seventh paragraph as to the delivery of a manuscript to the Public Printer, and although it is not alleged that the Printer had or could have any knowledge of Shambaugh, it is meant that the manuscript delivered to the Printer was not the Shambaugh manuscript. Of course it was not, as Shambaugh was not mentioned in the Act. In the same way the allegation in paragraph 8 in the Answer that the manuscript delivered was "not the identical manuscript Congress was to buy" must be understood as referring to the Shambaugh manuscript. The same reference is to be understood as to the first part of paragraph ninth of the answer (Transcript of Record, pages 17–18) and also as to the allegations of paragraph 10 (*Ibid.*, page 19).

The eleventh paragraph lays bare the real nature of the answer and strips it of every pretention to solidity. It sets forth that Mr. Dawson, a member of the House from Iowa (Professor Shambaugh's own State) who conducted the negotiations "for the purchase of petitioner's work," and "who was thoroughly familiar with all the details leading to the passage of the Act appropriating

ten thousand dollars, and who was instrumental in securing the passage thereof, and who, in that behalf represented the Congress in its determination to purchase a certain specific work from the petitioner, and to whom a definite outline of the particular manuscript was exhibited at the making of the contract of purchase, *which later, he, the said Dawson, succeeded in having embodied in the aforesaid Act on the part of Congress*," was the man who "discovered" that the manuscript submitted to the Public Printer "was not the identical manuscript, nor the identical, specific individual thing which Congress agreed to buy, and for whose purchase it appropriated ten thousand dollars. The manuscript delivered to the Public Printer was not the new edition represented to the Congress and the collaboration of Professor Shambaugh was wholly omitted in the manuscript delivered."

Exactly how a young and very recent member of the House was authorized to exercise all the powers of the House, Senate and President in making a purchase from Professor Thorpe of that which had been before Congress for more than a decade does not appear, but it is interesting to note that the special champion of Professor Shambaugh, with full knowledge of the details, and "who was instrumental in the passage" of the law, and who later "succeeded in having embodied in the aforesaid Act on the part of Congress" "a definite outline of the particular manuscript exhibited at the making of the contract of purchase" voted, as did the vast majority of House and Senate, for a bill which specifies in terms that the ten thousand dollars was appropriated "*for the purchase from Professor Thorpe of the manuscript* * * * *prepared by him* * * * Provided

that *he* shall prepare a complete index," and *which is entirely silent as to Professor Shambaugh!* Congress bought, as the Act plainly says, from Francis N. Thorpe the manuscript "*prepared* by him." It did not buy a manuscript prepared by Thorpe, edited or revised, or to be edited or revised by Professor Shambaugh; nor did Congress buy a manuscript which was to be the result of collaboration of Thorpe with Shambaugh. Dr. Shambaugh is a complete stranger to the contract. He is nowhere mentioned in it, nor is the thought of supervision, or editing or collaboration even distantly alluded to. "*The individualized literary entity,*" "the specific and distinctly featured literary entity," "the identical manuscript," "the identical specific individual thing which Congress agreed to buy" are the phrases used by the Secretary in his answer to designate the Shambaugh manuscript. They are unhappily chosen, for Professor Shambaugh is a stranger to the whole transaction, and he cannot be made a party by parol. If Mr. Dawson of Iowa was interested in Dr. Shambaugh, a member from Alabama might have been interested in Dr. Hannis Taylor, or a member from Massachusetts in Professor Albert Bushnell Hart, or a member from Pennsylvania in Professor McMaster; and it cannot be shown that Mr. Dawson's understanding was that of the House, to say nothing of the Senate and the President.

The only safe description is that given in the Act itself. The private views of a legislator form no part of a law.

The eleventh paragraph of the Secretary's answer states the respondent out of court.

When Mr. Dawson, as is distinctly asserted in the answer, "*succeeded in having embodied in the aforesaid Act on the part of Congress*" the description of the thing

sold, he made the language of the Act conclusive upon himself as its alleged author or foster parent, who, with full knowledge of all details, wrote it, as it is, or accepted it as written, and did not write into it the words relating to Shambaugh.

If the contention be good that Mr. Dawson, of Iowa, can object because Shambaugh is not recognized, another member could object to his recognition because of his exclusion from the law, and if Thorpe had tendered to the Printer a manuscript edited and revised by Shambaugh, some one else than Mr. Dawson would be ready with an objection, and the petitioner would find himself, with all his toil of twenty years and its precious results, crushed between the upper and the nether millstones.

While it may fairly be contended that the remaining paragraphs of the answer, as to non-delivery of the identical or specific thing bargained for, must be read in the light of the effort to make the words of the statute refer to Dr. Shambaugh, yet it is probable that the learned Judge thought that they put the burden on Dr. Thorpe to prove actual delivery of his manuscript, for he uses the words "described in the Act of Congress." It would be doing violence to contend that the Judge meant that the Shambaugh manuscript was intended by Congress and he has not intimated such an idea.

The answer cannot be read as a denial of the delivery of the Thorpe manuscript. There is no averment that the manuscript delivered is not the Thorpe manuscript, or that it is not the work of Professor Thorpe, or that it is not the work which it is admitted he has had before Congress for many years. There is no averment that any one has seen the manuscript which was delivered to the Public Printer, and declared it not to be the work of Professor Thorpe.

III. ACTION OF THE COURT BELOW ON THE DEMURRER.

The learned Judge in the court below overruled the demurrer of the petitioner, without filing an opinion.

The entry is: "It seems to me indisputable that the return denies that the physical thing delivered to the Public Printer was the identical subject matter *described* in the Act of Congress, and therefore presents an issue of fact upon at least this point."

Upon this narrow issue the petitioner tendered issue by

IV. A TRAVERSE OF THE RETURN.

V. Whereupon *the* respondent *moved to deny the writ of mandamus*, discharge the rule, and dismiss the petition of the relator.

This motion was denied and this appeal was taken.

The question is: Did the court err in dismissing the motion?

VI. GENERAL ARGUMENT.

Before considering the narrow point involved in the appeal, let the general features of the case be reviewed.

I. The Act of Congress contains the sole evidence of the contract.

It is contended, on behalf of the petitioner, that a complete contract exists between him and the Government, expressed in writing, definite in terms, and legally indestructible. The contract is embodied in the section of the Appropriation Act of Congress of June 30th, 1906, which reads as follows: "*Charters and Constitutions:* For the purchase from Professor Francis N. Thorpe of the manuscript for a new edition of charters, constitutions, and organic laws of all the States, Territories, and colonies now or heretofore forming the United States, and any Acts of Congress relating thereto, *prepared by him*, ten thousand dollars; Provided, That *he* shall prepare a complete index of the work and do all proof reading in connection with the preparation, printing, and publication thereof; and the Public Printer shall print and bind six thousand copies of the work, of which two thousand copies shall be for the use of the Senate and four thousand copies for the use of the House of Representatives."

The identity of the subject matter is fixed by the description. The author is designated by name. The subject of the manuscript is set forth; the manuscript is one "prepared by *him*." The price is fixed, and the condition of proof reading and indexing are imposed solely on the author, and the duty of the Public Printer is declared. Nothing is lacking.

There is no ambiguity, either patent or latent, in the words above quoted. They constitute in themselves a contract, in writing, between the parties. The Statute is an act of contractual expression by a legislative body; as a legal act, it presents the same problems as to intention, form, and interpretation, as other legal acts. As a legal act, being reduced to writing, it constitutes a transaction in itself, and is not merely proved by the writing, but, to put it in another way, the Statute is itself the act, the Constitution and the law requiring the will of Congress to be expressed in writing, *i. e.*, statutory form.

The Statute, as passed, becomes subject to the rule that, where by law an act is required to be done in writing, and in a given way, and would be ineffective if done otherwise, the writing is of course the only permissible subject of proof; it is immaterial what may have been intended; the act being necessarily put into written form must be judged of by the written form alone. In other words, the writing is the sole embodiment of the transaction. It is a fixed rule of law, founded upon principle and experience, that the terms of a contract cannot be varied by setting up other terms in competition with them; or, to put it in another way, there is a fixed rule against disturbing the plain meaning of a writing by extrinsic evidence, unless the terms are ambiguous.

As was said by Mr. Justice Holmes, "It would be inviting too great risks if evidence were permissible to show that, when they said five hundred feet, they agreed that it should mean one hundred inches, or that Bunker Hill Monument should signify the Old South Church." Numerous illustrations might be given of the rule which prohibits setting up extrinsic utterances to compete

with and overthrow the words of a document which solely embodies the transaction.

It is hornbook law that the main difference between written and verbal contracts lies in the mode in which they are to be proved. It results from an inflexible rule of the law of evidence that, when a contract is reduced to writing, it shall be proved by the writing and by that only; for the written instrument, being constituted by the parties the expositor of their intentions, must, in order to effectuate that object, be the only instrument of evidence to prove their intentions. To admit oral evidence as a substitute for instruments to which, by reason of their superior authenticity and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence, conjecture for fact, presumption for the highest degree of legal authority, and loose recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt.

Such has been the rule in England since the Countess of Rutland's case, 5th Reports, 26. Such a rule prevails in all of the States of the Union, with the single exception of Pennsylvania, of which it has been said, "The application of the rule seems to be governed by a test so anomalous that it may almost be said to destroy the essence of the rule." The explanation of the Pennsylvania doctrine is found in the absence of a separate Court of Chancery. But the rule which prevails in all parts of the United States, outside of Pennsylvania, is well expressed by Depue, J., in the case of Naumberg *vs.* Young, 44 N. J. L., 331: "In what manner shall it be ascertained whether the parties intended to express

the whole of their agreement in the written contract? * * * The only safe criterion of the completeness of a written contract as the full expression of the terms of the parties' agreement is the contract itself. * * * If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something has been left out, to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible."

This doctrine prevails in the Supreme Court of the United States.

In Seitz *vs.* Brewers Refrigerating Company, 141 U. S. page 510, it is ruled, in an opinion delivered by the Chief Justice, that, when a contract is couched in terms which import a complete legal obligation, with no uncertainty as to the object or extent of the engagement, it is (in the absence of fraud, accident or mistake) conclusively to be presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing. It was further held that whether the written contract in the case fully expressed the terms of the agreement between the parties was a question for the Court, *and silence on a point that might have been embodied in it did not open the door to parol evidence in that regard.* And it was further held that, when a known, described and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular purpose, yet, if the known, described and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

This case was confirmed in Harrison *vs.* Fortlage, 161 U. S., page 63, where Mr. Justice Gray said, "The Court

is not at liberty either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties had not made use of." And to the same effect, "That it must be assumed that the terms of the writing between the parties embody and express their whole intention and define all the conditions of the contract."

II. The Act of Congress is conclusive upon the court.

Apart from the foregoing general principles, the contract embodied in the General Appropriation Act of Congress of June 30th, 1906, is safe from assault because it is embodied in a law duly authenticated.

In Field *vs.* Clark, 143 U. S. Rep., 649, it was held: "The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress; and when the bill thus attested receives the approval of the President, and is deposited in the Department of State according to law, its authentication as a bill that has passed Congress is complete and unimpeachable.

"It is not competent to show from the journals of either House of Congress that an act so authenticated, approved and deposited, did not pass in the precise form in which it was signed by the presiding officers of the two Houses and approved by the President."

This doctrine has never been departed from. The case is dwelt upon and discussed in Wilkes Co. *v.* Coler, 180 U. S. R., pages 522–24. The Court says:

"As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attesta-

tions of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the Government, charged, respectively with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments *requires the judicial department to act upon that assurance*, and to accept as having passed Congress all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

III. The description in the Act of the thing sold is conclusive.

It is well established that, when an article is sold by a particular description, it is a condition precedent that the thing delivered should answer the description. A contract to sell *beans*, as put by Lord Abinger in the leading case of Chanter *vs.* Hopkins, 4 M. and W., 399 (Benjamin on Sales, Section 600, 6th American Edition, page 553), is not met by the delivery of *peas*. But, in this case, the answer takes the strange ground that a contract to sell *beans* is not met by the delivery of *beans*, but means that *beans* should mean *peas*, and that *peas* should have been delivered. The contract calls for the work of Dr. Thorpe. The answer does not deny that the work delivered is that of Dr. Thorpe, but it is contended that the contract should read, *Thorpe, edited and revised by Shambaugh*, and because Shambaugh's work was not delivered it is alleged that Thorpe did not comply with his contract. What possible ground can there be for such a contention? If the Court is bound by the Act of Congress, so also is the petitioner. If Thorpe had

tendered a MSS. not prepared by him, *i. e.*, in co-operation with another who was not mentioned in the Act, how effectively would that unauthorized substitution be seized upon as a ground for the denial of his right to the money. Would or could it be seriously pretended that a contract for a portrait painted by Sir Joshua Reynolds was met by the tender of a canvas by Sir Joshua Reynolds in part, and completed by a pupil in the studio? It was the work of the Master that was stipulated for, and of the Master alone. Let us view these positions more at length.

The case is governed entirely by the principles of the Law of Sales. See statement of principles by Mr. Justice Harlan in Pullman Car Co. *vs.* Metropolitan Railway, 157 U. S., 108: "The subject of implied warranty in sales of personal property was examined by this court in Kellogg Bridge Company *vs.* Hamilton, 110 U. S., 108, 116, and, subsequently, in Seitz *vs.* Brewers' Refrigerating Company, 141 U. S., 510, 518. In the first of these cases it was said that '*when the seller is the maker or manufacturer of the thing sold*, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker, by his occupation, holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the

judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use.' This principle was reaffirmed in the other case above cited, and it was there said: 'But it is also the rule, as expressed in the text-books and sustained by authority, that where a known, described and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described and definite article be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.' "

These words fit this case exactly. It is a sale by description (the Thorpe MSS.), and the goods are to be furnished by the manufacturer, Thorpe, the author. The description is stated in the written contract. There can be no parol modification of its terms, as described in the Act of Congress. There can be no substitution by the injection of Shambaugh. It would have been an evasion of his duty had Thorpe thrown any part of his work upon another. Had Congress wanted the work of Shambaugh in whole or in part, how easy it would have been to have said so. As Congress did not say so, how can any court say so? There is no averment in the answer that the thing delivered is not the thing described in the Act, but after an endeavor to substitute by parol some other thing, it is

then averred on information that *the other thing* was not delivered. This is manifestly insufficient.

Again: The sale was not subject to inspection or approval by the Public Printer, by the Secretary of the Treasury, by Congress, or any committee of Congress. The manuscript was bought on the reputation of Dr. Thorpe as a scholar, who had been before Congress with his manuscript for years. There is no averment that he delivered anything of which he was not the author; nor is there any averment that anybody has inspected the manuscript delivered to the Public Printer, and found it to be from another hand. What was delivered by Dr. Thorpe to the Public Printer has been *printed*, and so certified by the Public Printer, whose certificate also covers performance by Dr. Thorpe of all the conditions prescribed by the proviso in the Act.

Before Dr. Thorpe parted with his manuscript, he took the pains to write to the Public Printer and to the Secretary of the Treasury the letters which are set forth in paragraphs Nos. V, VI, VII, of the Petition for the Mandamus. The replies are set forth in the same paragraphs, and on the faith of the replies Dr. Thorpe parted with his property, and did the work. The Government has accepted the work by printing it, and is bound to pay. So far as Dr. Thorpe himself is concerned, *the buyer has consumed the goods*. There was not the slightest intimation from any one that the manuscript was not as called for. There was no rejection of it. It was taken on the 2d of May, 1907, and printed. Under date of September 9th, 1907, it was certified to the Secretary of the Treasury by the Public Printer that the petitioner had complied with all conditions, and it was not until November 26th, 1907, that, on demand, the Secretary

refused to pay; the letters of October 14th and 30th, and November 8th, and even the final interview with the Secretary on November 26th, giving no intimation of a rejection of the manuscript, and when a request was made for a statement of the character of the objections the request was refused and a copy of the objections was refused.

The following principles are well established in the law of sales: Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description. Wieler *vs.* Schelizzi, 17 C. B., 619, 624; Josling *vs.* Kingsford, 13 C. B. N. S., 447; Avery *vs.* Miller, 118 Mass., 500; Dailey *vs.* Green, 15 Pa., 125; Wolf *vs.* Deitszch, 75 Ill., 205; Hope *vs.* Allis, 115 U. S., 363.

It is clear that, if Dr. Thorpe had delivered a manuscript prepared by another, either in whole or in part, he would not have been complying with his contract. In furnishing a manuscript prepared solely by himself he has furnished goods answering the description, and by preparing an index and reading the proof sheets he has complied with the only conditions imposed by the contract.

It is also well established that, unless otherwise agreed, delivery of the goods and payment of the price are concurring conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods; or, to state it more concisely, unless the contract to sell otherwise provides, the buyer must pay in cash upon delivery. Tiffany on Sales, Sec. 109, p. 200; Hapgood *vs.* Shaw, 105 Mass., 279; Robison

vs. Tyson, 46 Pa., 286; Metz *vs.* Albrecht, 52 Ill., 491; Stoolfire *vs.* Royse, 71 Ill., 223; Simmons *vs.* Green, 35 Ohio State, 104; Rule 31 Principles of Sales, by Reuben M. Benjamin, p. 124, "Delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

It is also well established that the buyer is deemed to have accepted the goods when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. Philadelphia Whiting Co. *vs.* Detroit White Lead Works, 58 Mich., 29, 24 N. W., 881. And where the buyer has notified the seller of his rejection, he cannot use a portion of the goods in making a test for the purpose of determining the question of their fitness, or of providing evidence of their unfitness, and still insist on his right to reject them: Cream City Glass Co. *vs.* Friedlander, 84 Wis., 53, 54, N. W., 28; Chalmers on Sales, Section 38; Tiffany on Sales, Section 108, p. 198.

It is submitted that the facts in this case bring it within the foregoing principles. The sum of ten thousand dollars (the price) was appropriated by Congress for the Thorpe MSS. and in the performance by him of the conditions (which he avers he has performed and there is no denial of his performance of the conditions as expressed in the Act) he is entitled forthwith to his money.

IV. Finally, we contend that:

No error was committed by the Court below in denying the motion to deny the writ of mandamus, discharge the rule, and dismiss the petition of the relator.

This is the technical question to be disposed of on this appeal. It is clear that if a case such as has been shown by the foregoing discussion is not a fit subject for jurisdiction and trial in mandamus, then indeed is mandamus shorn of its meaning and usefulness. If this is not a case for mandamus, then pray what case can be fit? What would become of a writ, which Blackstone said was "of a most extensively remedial nature," and which, as he says, "was intended to enforce the due exercise of those ministerial powers * * * not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice." Blackstone's Comm. Book III., *pp. 110–111. What is it that makes the Supreme Court of the District of Columbia powerless in this case? How is it without jurisdiction? Is the writ to be made valueless in the face of what the Supreme Court of the United States has said in Roberts, Treasurer, *vs.* United States, 176 U. S., 231?

The learned Judge in the court below has ruled that there is an issue of fact in the record, to wit, whether the physical thing delivered to the Public Printer was the Thorpe manuscript described in the Act of Congress. He has refused to relinquish his jurisdiction, and maintains that mandamus is proper. Counsel for the respondent contend in substance that this question of fact cannot be considered by the court in a mandamus proceeding, but should be tried in the Court of Claims. Why?

Four grounds are submitted:

First.—That the traverse attempts to raise and try issues involving disputed questions of law and fact not properly triable in mandamus proceedings.

The Code of the District of Columbia provides expressly for the trial of issues of fact in mandamus proceedings. Chapter 62 of the Code, under the title "MANDAMUS," after sections providing for the filing of a petition asking the granting of a writ of mandamus and the issuance of rule thereon, Section 1275 provides:

> "The defendant, by the day named in such order, unless for cause shown the court shall extend the time, shall file an answer to such petition, fully setting forth all the defenses upon which he intends to rely in resisting such application, which shall be verified by his affidavit."

Section 1276:

> "The petitioner may plead to or traverse all or any of the material averments set forth in said answer, and the defendant shall take issue or demur to said plea or traverse within five days thereafter unless for cause shown the court shall extend the time; and such further proceedings shall thereupon be had in the premises for the determination thereof as if the petitioner had brought an action for a false return."

Section 1277:

> "If issue shall be joined on such proceedings, the same shall stand for trial at as early a day as the court shall appoint."

Section 1278:

> "Such issues shall be tried by a jury if both parties in writing require it, otherwise they shall be heard and determined by the court; and in case a verdict shall be found for the petitioner, or if the court upon hearing determine for the petitioner, or judgment be given for him upon demurrer or for want of a plea, such petitioner shall thereupon recover his damages and costs as he might have done in an action for a false return, to be levied by execution, and a writ of peremptory mandamus shall be granted thereupon without delay against the defendant."

Here is direct provision in the Code for the trial of questions of fact raised in a mandamus proceeding and the determination of them by the court or jury, and if the determination be favorable to the petitioner, the writ is to issue.

There is absolutely then no ground upon which to argue that this is the type of case that must be brought in the Court of Claims.

The Act of Congress making the appropriation in no way commits to the Secretary of the Treasury the right to determine as to whether the manuscript submitted by Dr. Thorpe was the one purchased by Congress, and Judge Wright virtually held that if it were determined in this trial that the proper manuscript was delivered, then there was no discretion to be exercised by the Secretary of the Treasury, but his act in issuing the voucher in payment was simply ministerial.

The case of West against Hitchcock, 22 Appeal Cases, District of Columbia, page 230, same case reported 205

U. S., 80, shows that in mandamus proceedings in the District questions of fact are considered by the court.

It is difficult to understand the force of the objection, particularly when the motion is made after there has been a joinder in pleading, raising a distinct and simple issue of fact. It is well settled that the various steps hitherto taken are equivalent to the old methods of procedure to obtain the writ, and that the rule to show cause granted upon the presentation of the petition, and hearing upon that rule, or a waiver by the respondent of a hearing upon the rule, was tantamount to a disposition under the old practice of a rule *nisi* and the actual issue of the writ. The actual issue of the writ was waived, and the respondent appeared and answered precisely as if a writ had been issued, couched in the terms of the petition, thus making a statement of a cause of action, to which the defendant's answer is filed in the nature of a return. To the return in this case objection was taken on demurrer, and, the demurrer being overruled, then, in accordance with practice, a traverse was filed, and the traverse is necessarily of a matter of fact and not of law. See Reg. *vs.* Briston Company, 2nd Queen's Bench, 64; Shortt on Mandamus, text book series, page 403. That this is the usual course of procedure appears from the opinion of Mr. Justice Bradley, in the case of Thompson *vs.* United States, 103 U. S., 480. On page 481 the learned justice says: "The court below having granted a rule to show cause why a mandamus as prayed for should not issue, the defendant filed an answer to the petition. * * * Defendant's answer was demurred to, but the demurrer was overruled, and the cause came on for trial. The jury rendered a special verdict as follows: * * * The questions raised on

the trial were * * * another question raised at the trial was * * * another point raised was * * * on motion of the petitioner's counsel this evidence was stricken out. * * * We think the court was justified in striking out the evidence. As a matter of evidence, whether in abatement or in bar, it should have been set up by a plea of *puis darrein continuance*, or its equivalent."

The foregoing extracts, tracing the various steps, show that proceedings in mandamus constitute a civil action, and, when raising an issue of fact, must be disposed of in the ordinary method of determining such issues.

The manner in which such issues are dealt with, and the fact that the parties are entitled to a hearing on the issues, is well set forth in various paragraphs of Spelling on Injunctions and Other Extraordinary Remedies, Second Edition (Little, Brown & Co., 1901), Sections 1687, 1688, 1689, 1690 and 1691, where the learned author deals with trial of issues, whether of fact or of law, the waiver of jury trial, the effect of a verdict, the extent of the inquiry, the admissibility and effect of evidence, the burden of proof, and judgment. In short, the whole chapter, No. LIII, in Spelling, which treats of practice in mandamus, shows that the proceedings in mandamus are nearly assimilated to those in ordinary civil actions, and in Section 1655 it is pointed out that the ordinary innovation in the common law practice, accomplished by the statutes of Anne, was to authorize the relator to plead or to traverse all or any of the material facts contained in the return.

It can scarcely be contended, therefore, that the mere circumstance that an issue is raised upon a question of

fact in mandamus proceedings is and can be made a proper ground for dismissing the proceedings.

In this connection, the language of Mr. Justice Peckham in the case of Roberts, Treasurer, *vs.* United States, 176 U. S., 231, is pertinent:

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted."

The learned judge points out that, even though a statute may, to some extent, require construction by the public officer whose duties may be defined therein, yet this does not necessarily make the duty of the officer anything other than a purely ministerial one, "if the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and, when his refusal is brought before the court, he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead

that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

If such a contention on the part of a respondent is unavailing in point of law, how much more unavailing must it be for a respondent to allege that the traverse of his return raises an issue of fact, and that the court is powerless to determine the truth of the matter?

If the mere circumstance that a fact in the return is traversed by the relator is sufficient to quash the proceedings, then the only office of a writ of mandamus would be to enable a court to act where all of the facts were conceded upon both sides. This would be a circumscription of jurisdiction in mandamus entirely unauthorized by precedent, and contrary to the very nature and substance of the proceeding.

The case of United States *ex rel.* Redfield *vs.* Windom, 137 U. S., 636, upon which reliance is placed by counsel for the respondent, is clearly distinguishable from the present case. In that case, the petition and the order to show cause having been taken as the alternative writ, a demurrer was interposed which was overruled by the court and the respondent ordered to make return. The facts set forth in the return showed that the contract of the petitioner was an additional one, that the conditions had been agreed to, that an essential part of the agreement was that the petitioner was not entitled to the control of the money to be paid, but that a trust attached as to its disbursement, and that, unless these conditions were performed, the relator was enabled to repudiate performance on his part of certain conditions precedent, and thus disputed questions of law and fact as to the

amount of the actual indebtedness of the United States to the relator, as to his agreement that money should not be delivered until claims of sub-contractors and material men had been satisfied out of the proceeds, and as to whether the remission of the forfeiture was absolute or conditional as to the validity of the agreement, and as to the legal effect of the petitioner's nonfulfillment of his contract, arose. It was as to a case such as this that the court said that the disputed questions of law and fact should not be tried in the proceeding. In other words, the state of pleadings in United States *ex rel. vs.* Windom went to the very terms and existence of a contract.

In this case, however, there is no dispute as to the terms of the contract which was embodied in the Act of Congress; it is not a question of the proof of the contract, or the establishment of any of its terms, that is in issue, but simply the matter of performance, the relator insisting that he has performed, the Secretary or respondent, upon information, alleging that the thing delivered is not the identical thing contracted for.

The sole question of fact to be determined is whether or not delivery has been made under the contract. If the thing described in the Act of Congress has been delivered and proof of the fact is made, what discretion is there in the Secretary of the Treasury which is beyond the writ of mandamus, or what dispute can there be as to the existence of the contract itself? Surely an Act of Congress must prove itself, and the Secretary cannot modify its terms.

Second.—The second reason alleged is that it appears from the traverse that the relator is attempting to sue the United States on a contract, and that there is no

jurisdiction in the court to entertain a suit against the United States for breach of contract.

This is not the proper interpretation of the record. This is not a suit to establish a contract or to recover damages for its breach. Nor is it a suit charging a breach of contract on the part of the Government. It is simply an effort on the part of Dr. Thorpe, through proper legal steps, to require a Government official to perform a ministerial act. The United States purchased from the relator the Thorpe manuscript; the manuscript has been delivered; it has been printed by the Government; the Public Printer has certified to the Secretary that the work has been done and that the only conditions prescribed in the Act of Congress to be performed by the relator have been performed, and thereupon the duty attaches to the Secretary of the Treasury to make payment of the amount of moneys specifically appropriated by Congress to the payment for the goods sold. The real substance of the answer of the respondent is that the thing delivered was not the identical thing contracted for. Upon the establishment of this as a fact by the trial, the duty of the Secretary to make payment is clear. There is no discretion lodged in him, no right of rejection, no right of supervision, of criticism, or of condemnation.

Third.—It is alleged that the duty of the Secretary in the premises is not merely ministerial, but involves the exercise of discretion and judgment upon mixed questions of law and fact. This is simply to deceive oneself by words. There is no question of law involved. The Act of Congress speaks for itself. It is not open to disputation or construction; the Secretary has no

discretion; the only conditions imposed by the Act have been performed by the relator—the reading of the proof sheets and the preparation of an index. This is the key to the situation. No member of Congress, either as an individual or in conjunction with a large body of his fellows, can either attempt to interpret the legislatively expressed will of Congress or read into the Act anything which Congress has not placed there; *a fortiori* the Secretary of the Treasury cannot read in any conditions or any words which are not there found. There is no room for discretion or judgment.

If it should be determined upon trial in the court below that as a fact Dr. Thorpe delivered to the Public Printer the manuscript that the Congress provided the appropriation for, then what else is there but a ministerial act to be performed by the Secretary of the Treasury, namely, the preparation of a voucher for $10,000, and its delivery to Dr. Thorpe?

This act on the part of the Secretary will require the exercise of neither discretion nor judgment. The Supreme Court has gone so far as to sustain the granting of a mandamus in cases where seemingly the Government official had exercised discretion and judgment in determining what was the law and what was the fact, and the Supreme Court held that as in its judgment the law was not properly construed by the Government official, nor even the facts perhaps determined rightly by him, the mandamus proceeding was sustained.

We rely with confidence on the case of Roberts *vs.* The United States, 176 U. S., 221.

Fourth.—The fourth reason alleged is simply a restatement in different language of the preceding positions.

The following references are made as to the use and scope of proceedings in mandamus:

Kendall *vs.* Stokes, 3d Howard, 87; United States *vs.* Schurz, 102 U. S., 378; Butterworth *vs.* Hoe, 112 U. S., 50; United States *vs.* Black, 128 U. S., 40; International Contracting Company *vs.* Lamont, 155 U. S., 308; Roberts, Treasurer, *vs.* United States, 176 U. S., 231.

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed.

There is also fair ground for contending, as the whole record has been brought before this court by the Counsel for the Respondent in basing his motion to turn the Petitioner out of court upon the answer and traverse, which refer to and must be considered in connection with the original petition itself, that, if this Appellate Court should be of opinion that the lower court erred in overruling the demurrer to the answer, then this court has the power not only of affirming the lower court in overruling the motion to dismiss the writ, but further to direct that the demurrer be sustained and that a peremptory mandamus do issue because of the lack of substance and character in the answer. If the effort to read into the Act of Congress the contention as to Professor Shambaugh is doomed—and fail it must—then what respectable reason appears in the record to justify a great government in despoiling a citizen of his life work?

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